Supreme Court, U.S.
FILED
MAY 1 2001
OFFICE OF THE CLERK

No. 00-6933

IN THE
Supreme Court of the United States

REMON LEE,
Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: NOVEMBER 3, 2000
CERTIORARI GRANTED: FEBRUARY 26, 2001

TABLE OF CONTENTS

Page

Relevant Docket Entries

United States District Court for the Western District of Missouri, Case No. 98-CV-74 1

United States Court of Appeals for the Eighth Circuit, Case No. 99-2406 4

State Court Proceedings (included in Record No. 8)

Excerpts from the Trial Transcript, Feb. 22-24, 1994, Circuit Court of Jackson County, Missouri, Case No. CR93-0453 10

Excerpts from Voir Dire of Jury 10

Excerpt from Defendant's Opening Statement... 12

Testimony of Remon Lee / Colloquy on Request for Continuance 15

Defendant's Announcement Regarding his Alibi Witnesses 24

Excerpt from Defendant's Closing Argument ... 25

Excerpt from Prosecutor's Closing Argument... 26

Defendant's Motion for Judgment of Acquittal or, in the Alternative, for a New Trial, Mar. 11, 1994, Circuit Court of Jackson County, Missouri 28

[Item omitted: Certificate of Service]

Excerpt from Transcript of Sentencing Proceedings, Apr. 19, 1994, Circuit Court of Jackson County, Missouri 33

[Item omitted: Reporter's Certificate]

Judgment, Apr. 19, 1994, Circuit Court of Jackson County, Missouri 42

TABLE OF CONTENTS—Continued

Page

Motion to Vacate, Set Aside or Correct the Judgment or Sentence, Nov. 21, 1994, Circuit Court of Jackson County, Missouri 45

Verified Request for Evidentiary Hearing, Nov. 21, 1994, Circuit Court of Jackson County, Missouri 54

First Amended Application for Postconviction Relief, July 3, 1995, Circuit Court of Jackson County, Missouri..... 55

Request for a Hearing Date, July 3, 1995, Circuit Court of Jackson County, Missouri 65

Findings of Fact, Conclusions of Law and Order, Aug. 21, 1995, Circuit Court of Jackson County, Missouri..... 67

Appellant's Brief, July 6, 1996, Missouri Court of Appeals 80

Respondent's Statement, Brief and Argument, Aug. 28, 1996, Missouri Court of Appeals..... 102

Order and Memorandum Supplementing Order, Oct. 22, 1996, Missouri Court of Appeals..... 122

Federal Court Proceedings

Petition for Writ of Habeas Corpus, Jan. 16, 1998, U.S. District Court for the Western District of Missouri, Case No. 98-CV-74 132

[Item omitted: affidavit in support of request to proceed in forma pauperis]

Affidavit and Story of Petitioner, Jan. 16, 1998 161

Motion to Include Documents, Feb. 20, 1998..... 163

TABLE OF CONTENTS—Continued

Page

Affidavit of Reginald Rhodes (Exhibit 1)..... 166

Affidavit of Laura Lee (Exhibit 2)..... 168

Affidavit of Gladys Edwards (Exhibit 3)..... 170

Affidavit of Minister James Edwards (Exhibit 4)..... 173

State's Response to Request for Discovery (Exhibit B.B.)..... 175

[Items omitted: extra copies of affidavits and excerpts from the trial and sentencing transcript included in Exhibits A.1, A.2, and A.3]

Order Granting Petitioner's Motion to Include Documents, Feb. 24, 1998 179

Response to Order to Show Cause Why Petitioner's Petition for Writ of Habeas Corpus Should Not Be Granted, Mar. 11, 1998 180

Petitioner's Reply to Respondent's Response, May 13, 1998 191

Supplemental Response to Petition for Habeas Corpus Addressing the Petitioner's Affidavits, Mar. 25, 1999..... 209

Opinion and Order Denying Petition for Writ of Habeas Corpus, Apr. 19, 1999..... 212

Judgment in a Civil Case, Apr. 19, 1999..... 219

Motion for Relief from Judgment—Reconsideration/Rehearing of Habeas Petition, May 12, 1999 220

Notice of Appeal, May 14, 1999..... 227

TABLE OF CONTENTS—Continued

Page

Order Denying Petitioner's Motion for Reconsideration and Denying Petitioner Leave to Proceed In Forma Pauperis on Appeal and a Certificate of Appealability, May 19, 1999..... 229

Order Granting Application for Certificate of Appealability, Sept. 30, 1999, U.S. Court of Appeals for the Eighth Circuit, Case No. 99-2406 232

Opinion, May 25, 2000, U.S. Court of Appeals for the Eighth Circuit 233

Judgment, May 25, 2000, U.S. Court of Appeals for the Eighth Circuit 257

Order Denying Petition for Rehearing and Petition for Rehearing En Banc, Aug. 8, 2000, U.S. Court of Appeals for the Eighth Circuit..... 258

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
(KANSAS CITY)

CIVIL DOCKET FOR CASE #: 98-CV-74

Lee v. Kemna, et. al. Filed January 16, 1998

Assigned to: Judge Howard F. Sachs
Referred to: Prisoner Pro Se

Demand: $0,000 Nature of Suit: 530
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

REMON LEE,
Petitioner,

v.

MIKE KEMNA, Superintendent
Respondent,

JEREMIAH (JAY) NIXON, Attorney General,
State of Missouri
Respondent.

[addresses and counsel omitted]

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
		* * * * *
1/16/98	1	PETITION FOR WRIT OF HABEAS CORPUS pursuant to 28:2254 w/req to proceed ifp. (PROV. filed pursuant to Court en banc order of 10/21/97) Def's w/auth (sb)

DATE	NO.	PROCEEDINGS
		* * * * *
2/10/98	5	ORDER TO SHOW CAUSE: by Judge Joseph E. Stevens Jr. (1) pet. granted ifp; and (2) resp ordered to show cause by 3/10/98 (cc: all counsel) (ce)
2/20/98	6	MOTION by petitioner Remon Lee to include documents (ce)
2/24/98	7	ORDER by Joseph E. Stevens Jr. granting motion to include documents [6-1] (cc: all counsel) (ce)
3/11/98	8	Response by respondent Mike Kemna to Order to show cause why petitioner's mt for writ of habeas corpus should not be granted (jr) [Entry date 03/12/98]
3/13/98	—	REMARK: received respondent's exhibits to response to show cause order (dw)
3/16/98	9	ORDER by Judge Joseph E. Stevens Jr. That pet. file a reply to resp's response w/n 30 days from the date of this Order, or this case will be dismissed w/o further notice. (cc: all counsel) (ce)
		* * * * *
5/13/98	12	Reply by petitioner Remon Lee to respondent's response (dw)
1/20/99	13	ORDER: by Judge D. B. Bartlett: reassigning this case to Judge Howard F. Sachs (cc: all counsel) (rs) [Entry date 01/21/99]
		* * * * *

DATE	NO.	PROCEEDINGS
3/25/99	15	Supplement by respondent Mike Kemna re response order [8-1] addressing pet's affidavits (dw) [Entry date 03/29/99]
4/19/99	16	ORDER by Judge Howard F. Sachs denying habeas corpus petition [1-1], granting pet's motion to expedite ruling [14-1] terminating case with prejudice (cc: all counsel) (dw)
4/19/99	17	CLERK'S JUDGMENT Entered on: 4/19/99 this case is dismissed with prejudice (cc: All Counsel) (dw)
5/12/99	18	MOTION by petitioner Remon Lee for relief from judgement reconsideration/ rehearing of habeas petition (dw)
5/14/99	19	NOTICE OF APPEAL by petitioner Remon Lee from Dist. Court decision, [17-1] Filed 4/19/99 Entered 4/19/99 (dw)
5/19/99	20	ORDER by Judge Howard F. Sachs denying motion for relief from judgement reconsideration/rehearing of habeas petition [18-1]; and denying certificate of appealability and leave to proceed ifp on appeal (cc: all counsel)

GENERAL DOCKET FOR
EIGHTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 99-2406
Filed: 5/26/99

Remon Lee, et al v Mike Kemna
Prisoner petition – state – habeas corpus PRO SE
Appeal from: U.S. District Court, Western Missouri

Lower court information:

District: 0866-4 : 98-74-CV-W-8-P
Trial Judge: Howard F. Sachs, Senior Judge
Date Filed: 1/16/98
Date order/judgment: 4/19/99
Date NOA filed: 5/14/99

Fee status: pending

Prior cases: None

Current cases: None

REMON LEE
Petitioner-Appellant,

v.

MIKE KEMNA, Superintendent
Respondents-Appellees,

JEREMIAH (JAY) NIXON, Attorney General,
State of Missouri
Respondents-Appellees,

[addresses and counsel omitted]

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/26/99	Prisoner Case Docketed Dist. Ct. Office: Kansas City, Missouri [1137302] (dgh)
5/26/99	APPLICATION for Certificate of Appealability. [99-2406] [1137307], notice of appeal, docket entries, judgment dated 4/19/99. (dgh)
5/26/99	RECORDS received: Original File, consisting of 1 vol. & 2 exp. folders, Location STL. [99-2406] (dgh)
6/2/99	APPEARANCE for appellee, attorney Michael Joseph Spillane [99-2406] [1140915] (kms)
8/4/99	SUPPLEMENTAL APPLICATION for Certificate of Appealability. [99-2406] [1163751] (dgh)
9/24/99	CASE is no longer pro se. [99-2406] (yml)
9/27/99	C.J.A. voucher issues. E. Ann Wright of Kansas City, Missouri is hereby appointed under the Criminal Justice Act to represent appellant Voucher #99240601. [99-2406] [1184900] (dgh)
9/30/99	JUDGE ORDER: granting application for Certificate of Appealability on the question of whether Mr. Lee's due process rights were violated by the state trial court's failure to allow him a continuance. [1163751-1] [99-2406] [1184883] (dgh)

* * * * *

DATE	PROCEEDINGS
10/19/99	DESIGNATION of record received from Appellees Mike Kemna, Appellees Jeremiah (Jay) Nixon. [99-2406] (yml)
11/2/99	RECORDS received: Clerk's Record, consisting of 1 Volumes, copies 3. Location: STL [99-2406] (stl)
11/2/99	RECORDS received: Exhibits, Located in: STL, consisting of two folders of respondent's exhibits. [99-2406] (stl)
11/24/99	BRIEF FILED - Brief of Appellant - Remon Lee. 44 pgs - w/disk - w/addendum - 10 copies - w/service 11/23/99. [99-2406] [1207700] (yml)
12/27/99	BRIEF FILED - Brief of Appellee - Mike Kemna, Jeremiah (Jay) Nixon. 27 pgs - w/disk - 10 copies - w/service 12/23/99. [99-2406] [1216375] (yml)

* * * * *

1/10/00	BRIEF FILED - Reply brief - Remon Lee. 12 pgs - w/disk - 10 copies - w/service 1/6/00. [99-2406] [1222024] (yml)

* * * * *

DATE	PROCEEDINGS
3/13/00	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Morris S. Arnold, Circuit Judge, George G. Fagg, Senior Judge, Mark W. Bennett, Visiting Judge (District Judge, Northern District of Iowa; Sioux City, Iowa). E. Ann Wright for Appellant Remon Lee. Michael Joseph Spillane for Appellees Jeremiah (Jay) Nixon, and Mike Kemna. Rebuttal by: Ms. E. Ann Wright. RECORDED. [99-2406] (lad)
3/13/00	APPEARANCE for appellant, attorney E. Ann Wright [99-2406] [1243248] (lad)
5/25/00	THE COURT: Morris S. Arnold, George G. Fagg, Mark W. Bennett. PER CURIAM OPINION FILED: PUBLISHED, DISSENT by Mark W. Bennett [99-2406] [1271964] (paw)
5/25/00	JUDGMENT: Morris S. Arnold, George G. Fagg, Mark W. Bennett : The judgment of the lower court is AFFIRMED in accordance with the opinion. [99-2406] [1271974] (paw)
6/8/00	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellant Remon Lee, w/service 6/7/00., TO COURT., for rehearing by the panel, filed by Appellant Remon Lee w/service 6/7/00, TO COURT. [99-2406] (cmd)

DATE	PROCEEDINGS
7/7/00	Clerk letter sent notifying that party has an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Remon Lee [1277585-1] [1277585-3] [99-2406] Response due by 7/17/00 (srd)
	* * * * *
7/20/00	RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Remon Lee, Remon Lee [1277585-1] [1293492], petition for panel rehearing filed by Remon Lee, Remon Lee [1277585-3] [1293492]. Response filed by Mike Kemna, Jeremiah (Jay) Nixon. w/service 7/18/00 TO COURT. [99-2406] (cmd)
8/8/00	JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [1277585-1] filed by Remon Lee, Remon Lee. Petition for panel Rehearing is also denied. [99-2406] [1299152] (cmd)
9/1/00	MANDATE ISSUED [99-2406] (cmd)
	* * * * *
11/14/00	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 11/3/00. Supreme Ct. Case No. 00-6933 [99-2406] [1355312] (cmd)
	* * * * *

DATE	PROCEEDINGS
3/2/01	Notification from U.S. Supreme Court dated 2/26/01 stating that they had entered an order granting Supreme Court notice for certiorari and granting motion for leave to proceed in forma pauperis. Supreme Ct. No. 00-6933.

[Excerpt from Voir Dire of Jury]

* * * *

[114] tells you a later on, that I'm not entitled to go into it and don't intend to now—that you determine credibility of the witnesses. He'll explain all of that to you.

Now, the next thing sounds facetious but it's not. Bear with me.

I want to know if any of the you object to the accused being defended by little short fat guy with a beards." And the reason I ask that is I asked it a couple of years go and up goes a juror's hand, and he said, " I don't like little fat guys with beards."

So I'm asking you in all sincerity, does anybody object to him being defended by a little short fat guy with a beard?

[No response.]

MR. McMULLIN: I take it not by your silence.

Now, as the Prosecutor's indicated, there's no motive, no physical evidence, no scientific evidence directly tied to the accused. There will be a defense in this case, which is a defense of alibi. An alibi, if you watch television, has evil connotations. Alibi, to most people who watch television, means the bad [115] guy, the mafia member, is really the bad guy and he's just saying he was somewhere else. But it is a valid and legitimate defense, if you find it so, that he was not at the scene, was not even in town at the time. And we'll put on evidence—I can't go into it now—that he was somewhere else, he couldn't commit the crime and I believe the judge will give an instruction on alibi at the conclusion of my case.

Is there anybody here who would not follow the judge's instruction on alibi if he gives that?

[No response.]

MR. McMULLIN: I take it by your silence you would follow the judge's instructions.

Next, is there anyone here that feels a defendant must prove himself innocent or must prove himself not guilty? Some people feel that way. You have a right to, but that's not our law; and the judge won't instruct you that way.

Is there anybody here that feels the defendant must put on any evidence to prove himself innocent, and if he doesn't that might be some evidence of guilt? Anybody feel that

* * * *

[Excerpt from Voir Dire of Jury]

[121] Now, there will be a number of pictures. We're used to it in murder cases, Linda and I. They're 8 x 10 color, bloody pictures. They're not very pleasant, and some people are so shocked when you're not used to seeing it—so shocked—when they see the pictures they say, My God, somebody killed him, he's the accused, he must have done it. And they lose their reason and find guilty simply because of the bloody pictures.

Is there anybody here that feels they would be so as minds would be so—minds would be so inflamed or so upset that you would automatically say the defendant did it, even if the evidence was not there beyond a reasonable doubt?

[No response.]

MR. McMULLIN: I take it not by your silence.

I think I'm about through. Give me just a moment.

Oh, I do have another thing too.

The defendant does not have to put on evidence, but we intend to put on evidence. We intend to put on evidence from—on the alibi of his mother Gladys Edwards who lives in [122] Ventura, California. Does anyone know Gladys Edwards?

[No response.]

MR. McMULLIN: Do any of you know his sister Laura Lee who will testify that he was out there in California in of August of 1992—and obviously couldn't have been here committing the crime? And his stepfather, Mr. James Edwards, a minister who will testify he was out there and he picked him up at the airport and took him back after his visit.

Now, is there anybody here that knows any of those people?

[No response.]

MR. McMULLIN: I take it not by your silence then.

The other part of the defense is the attack on the only eyewitness by a gentleman, a lawyer, by the name of Robert Calbi—C-a-l-b-i—a well known young attorney here in town, and his investigator, Fred Macon—M-a-c-o-n—who works for Mr. Calbi.

And Mr. Calbi took a report, a statement of the State's main witness which is contradictory—I can't go into it in detail—

* * * *

[Excerpt from Defendant's Opening Statement]

[194] Then the next part of the defense evidence will be, as I talked to you earlier, called an alibi. If you're not here or at the scene of [195] the crime, you can't commit it. We will put on three witnesses for the defense, and you will see them and be able to evaluate them and see whether or not they're liars or not. You can determine for yourself.

You will hear from Mr. James Edward—not necessarily in this order. Mr. James Edwards is an elderly black man who lives in Ventura, California. He is married to Reggie's mother now. Her name is Gladys Williams. And Mrs. Gladys Williams has a daughter by the name of Laura Lee, who has four daughters. Ms. Laura Lee lives in Ventura, California.

Mr. Edwards will testify that in July of '92 he and his wife were and still are living in Ventura. Laura Lee lived in Ventura, and Reggie—Remon Lee was to come out on July the 9th for a birthday party of Laura's daughter Maria, and that he was also to be there for his birthday, which is July the 10th. And she will testify, as will Mr. and Mrs. Edwards, that they are a close-knit family.

But Remon didn't get out there on the 9th or the 10th but two or three days later. Mr. Williams {sic} and his wife will tell you very [196] frankly that they drove to Los Angeles from Ventura, met Remon at the airport and took him back to Laura's house where he stayed for July, August, September. And he came back a day or two before Halloween in August of '92, and they remember that because they were having a big birthday party for Laura's four children and they begged Remon to stay for the Halloween party on the 31st of October. But he came back few days before. And Mr. Lee will tell you he took him back himself to the airport. Mr. Edwards, I mean.

Mr. Edwards will testify that he didn't see him every day. He saw him at least once a week in July, August, September and through October. Mrs. Edwards will testify that she went with her husband to pick him up a couple of days after August the 9th, and that they were a close-knit family and having a party for Maria on the 9th, and he was to be there on the 10th and he met them at the airport. And she saw him almost every day in July, August—till August 27th, 1992—September and October.

And Laura Lee will testify that the mother and father brought him to her house. He stayed at [197] her house all of July, all of August, all of September, and all of October until he came back. And she saw him every day because he ws living in a bed in her house.

That will basically be our evidence. I will ask simply until you've heard all of the evidence and the instructions of the judge, that you keep your minds open and not form or express any opinions, at which time I will ask you for a verdict of not guilty.

I thank you very much.

The COURT: Counsel, you may proceed with your case.

THURSDAY, FEBRUARY 24, 1994
AFTERNOON SESSION

[In session without the jury present at 1:06 p.m.]

[572] MR. McMULLIN: Judge, at this time outside the hearing of the jury I'd like to put the defendant back on the stand. I advised him before trial that he had a right to testify and not right to testify, but I always like to ask them again after the State closes their case to be sure, in case there's any change.

THE COURT: Right.

MR. McMULLIN: Sir, would you take the stand, please.

[Defendant takes stand.]

REMON LEE,

having been previously sworn by the Deputy Clerk of Court, testified:

DIRECT EXAMINATION by Mr. McMullin:

Q. Sir, you've previously been sworn?
A. Yes, sir.
Q. And you understand you're still under oath?
A. Yes, sir.
Q. Now sir, you sat here during this entire trial with me assisting me in the trial, and we've [573] talked together during recesses and you've—we've written each other notes; is that true?
A. Yes, sir.
Q. And you testified outside the hearing of the jury before we started, and I advised you of your rights. You had a right to testify or not to testify, and that was entirely up to you. I told you that?
A. Yes, sir.
Q. And I told you all the advantages of testifying and all the disadvantages, didn't I?
A. Yes, sir.

Q. I told you that I recommended that you not testify, but that was up to you. You could say you want to, and you certainly have a right to do so.

You understand that?

A. Yes, sir.

Q. Now the State has rested and we put on part of our defense, and three of our witnesses, your stepfather, your stepmother, or your real mother, and—let's see, Gladys Edwards is your mother, right?

A. Yes.

Q. James Edwards is your stepfather?

[574] A. Yes, sir.

Q. And Laura Lee is your older sister?

A. Yes, sir.

Q. And they came in from California to testify, didn't they?

A. Yes, sir.

Q. And you're aware they came into my office Monday, and I talked with them. You're aware of that?

A. Yes, sir.

Q. And you've talked with them since then?

A. Yes, sir.

Q. And you're aware that the Kansas City Police went out and talked to them, Officer Wantland went out and talked to them a day or two ago?

A. Yes, sir.

Q. Out at what at Brooklyn—

A. Thirty-second and Brooklyn.

Q. Thirty-first and Brooklyn?

A. Thirty-second and Brooklyn.

Q. Thirty-second and Brooklyn.

And you're aware they were here this morning?

A. Yes, sir.

Q. At 8:30?

[575] A. Yes, sir.

Q. For the record, they called me last night. Originally when they came into town Monday, they were staying at the Cloud 9 Motel at 87th and Blue Ridge, weren't they?

A. Yes, sir.

Q. And then they moved from there to whose house?

A. My uncle's.

Q. What's his name?

A. Robert Brown.

Q. Robert Brown?

A. Yes, sir.

Q. All right.

And they told me on the phone there, for the record, they didn't have a phone. And they didn't have, did they, because you couldn't call them out there, could you?

A. Yes, sir.

Q. But they called me last night and agreed to come down, and you saw them here at 8:30 this morning, didn't you?

A. Yes, sir.

Q. And during one of our two recess, 9:00 or 10:00 or 11:00 you saw them in the—you knew they were here, didn't you?

[576] A. Yes, sir.

Q. And for the record, they're gone. They left at 11, according to people I talked to out there. We don't know where. You've called your girlfriend, Alicia Roberts, haven't you, trying to locate them?

A. Yes, sir.

Q. She told you she couldn't find them?

A. Yes, sir.

Q. And I left my mobile pager—not pager—but my mobile telephone number here in my pocket, and she—she called me a few minutes ago and said she hadn't heard from them.

We don't know where they went, do we?

A. No, sir.

Q. And I told you previously when they got here that I'd given them subpoenas along with copies of their statements, didn't I?

A. Yes, sir.

Q. And they were here. We don't know why they left, do we?

A. No, sir.

Q. Did I tell you now that there's nothing I can do if they're not here?

A. Yes, sir.

[577] Q. All I can do is proceed without them and do the best I can.

Do you understand?

A. Yes, sir.

Q. Is there anything you think you ought to do or want me to do or that I refused to do to try to get them back here during—for this trial?

A. Well, I would like to know if we can get a couple hours' continuance and try to locate them, because it's very valuable to my case.

Q. All right.

I'll ask the Court for that at the proper time.

I suppose we could ask for a capias, and—but if they're from California I don't know. Anyway—

A. I know in fact they didn't go back to California, sir. I know that.

Q. How do you know that?

A. Because they have some ministering—my stepfather's a minister—to do here tonight and tomorrow night.

Q. Well, getting back—we'll cover that later.

Getting back to this, you still—you understand your rights. You still have a right [578] to testify and a right not to testify?

A. Yes, sir.

Q. And one of the reasons that I recommend you not testify is you were found guilty on an assault case with armed

criminal action a month or two ago in a separate case in Jackson County, weren't you?

A. Yes, sir.

Q. And Judge Ely give you 50 years and 8 years to run consecutive on those two, didn't he?

A. Yes, sir.

MS. KOCH-CARROLL: No, 50 and 30.

Q. [BY MR. McMULLIN:] Okay. Fifty and thirty to make it a total of eighty years?

A. Yes, sir.

Q. And you have several other felony convictions; isn't that true?

A. Yes, sir.

Q. And you understand—I told you if you get on the stand and testify, they could get—they can introduce those to the jury. But if you don't testify, this jury won't know about it.

You understand that?

A. Yes, sir.

Q. And the judge has given an instruction or [579] approved an instruction he's going to give, he's indicated, that says the fact that you do not testify cannot be used as evidence against you.

You understand that?

A. Yes, sir.

Q. So do you want to testify or not testify?

A. No, sir.

Q. Again, out of an abundance of caution, do you understand, sir, that if you're convicted tomorrow or next year or the year after, and you try to come back and say, "Well, hey, I wanted to testify and McMullin wouldn't let me or somebody threatened me or they lied to me," you're not going to get anywhere.

You understand that?

A. Yes, sir.

Q. All right.

MR. McMULLIN: Your Honor, I have no further questions of this witness.

THE COURT: All right.

I think you've made a good record with respect to his rights and his right to testify or not. And you've made—well, do you intend to file a motion for a continuance?

MR. McMULLIN: He's asked for one, [580] Judge. I think I better ask for a continuance on the thing. The jury can go home now until tomorrow, and I'll have to get my subpoenas—my copies of my subpoenas out of my file which I served, and we'll have to ask for capiases for them. I've got an address out there, 30—I've got it here—3220, I believe it is, Garfield. I've got it in my file here.

I'll have to ask for a continuance until 9:30 in the morning, tomorrow morning. Tomorrow is Saturday.

THE COURT: Mr. McMullin—

MR. McMULLIN: Friday.

THE COURT: Friday. And my daughter is going to be in the hospital all day.

MR. McMULLIN: Oh, I'm sorry.

THE COURT: So I've got to stay with her.

Now, let me ask you: These people were not actually served with subpoenas?

MR. McMULLIN: No, I served them with subpoenas in my office. They came from California voluntarily, sir.

THE COURT: Okay.

MR. McMULLIN: And got to my office [581] Monday, which was a holiday.

THE COURT: So you actually served them the subpoenas?

MR. McMULLIN: Yes, sir. I took their statements, and—their handwritten statements and gave them a copy of their handwritten statements, which I have here; and gave them a—the subpoena, and I've got the copies in my file.

MS. KOCH-CARROLL: What day did you subpoena them for?

MR. McMULLIN: Monday—I subpoenaed them for Tuesday, but told them not to come until—I put on my subpoena "Do not come until called."

I do that on all my witnesses, so they don't sit there all day.

MS. KOCH-CARROLL: What day did you subpoena them for, yesterday?

MR. McMULLIN: I don't know. Let me look.

[A discussion was held off the record.]

MS. KOCH-CARROLL: Was it yesterday? They have been here?

[582] MR. McMULLIN: Gladys Edwards, I issued the subpoena, had the girl fill it out for 2-17 to order them to appear in 6 on Thursday the 24th at 9 a.m.

THE COURT: Is she the mother?

MR. McMULLIN: Gladys Edwards is the mother, yes, sir.

MS. KOCH-CARROLL: Yes, sir.

MR. McMULLIN: Freddie Macon was issued on the 17th, but he's not the one—there was—

MS. KOCH-CARROLL: The 24th is today—

MR. McMULLIN: Yeah.

MS. KOCH-CARROLL: —at 9:30.

MR. McMULLIN: I said 9:00.

MS. KOCH-CARROLL: Nine o'clock.

MR. McMULLIN: But they were in Monday, and your officer talked to them yesterday or the day before and I gave them copies of it then.

THE COURT: Well, I'm going to have to deny the motion for continuance. It looks to me as though the folks were here and then in effect abandoned the defendant. And that, of course, [583] we can't—we can't blame that on the State. The State had absolutely nothing to do with that. That's—it's too bad. The Court will not be able to be here tomorrow to try the case.

MR. McMULLIN: How about Monday, Judge? The jury's not locked up. Could we set it over until Monday morning?

THE COURT: I've got another case set for trial that will take a week starting Monday morning. I'm not in a position to grant a continuance under these circumstances. The folks were here today. They were seen here on this floor of the courthouse, and they apparently simply have abandoned—

MR. McMULLIN: Well—

THE COURT: —the defendant in—although they're family, despite the fact that they're under subpoena.

MR. McMULLIN: It looks like that, Judge. I don't know. I would—I can neither confirm nor deny. It may be that someone threatened them, but I have no proof of that. They may, as the Court said, have been abandoned. I don't know.

[584] THE COURT: I have to deny the motion for continuance.

MR. McMULLIN: All right, sir.

THE COURT: We have to go ahead with the trial.

MR. McMULLIN: All right, sir.

Did you see them out there?

UNIDENTIFIED MAN: No, sir. They are not on this floor.

MR. McMULLIN: All right.

Judge, I'm prepared to—when they come back in—to rest and again file a motion for judgment of acquittal, at the conclusion, which I'll file—

THE COURT: You're going to give that to me that orally and you'll supplement that with a written motion?

MR. McMULLIN: Yes, sir, I will.

THE COURT: Okay.

MR. McMULLIN: And then before I rest—well, I better—we'll ask to pass the exhibits first.

THE COURT: Yeah.

MR. McMULLIN: And then after they go, then I'll rest.

[585] THE COURT: Bring the jury down.

THE BAILIFF: Yes, sir.

THE COURT: Thank you.

[A discussion was held off the record.]

MR. McMULLIN: Judge, for the record, Officer Clark—you're a correctional officer?

OFFICER CLARK: Yes, sir.

MR. McMULLIN: And you have custody of the defendant?

OFFICER CLARK: Yes, sir.

MR. McMULLIN: And you saw Mr. and Mrs. Edwards and his sister out there with me this morning in the witness room next to where the defendant was—

OFFICER CLARK: I saw who you were speaking with. I don't know who—

MR. McMULLIN: You saw the three elderly—two elderly and one middle-aged black lady?

OFFICER CLARK: Yes, sir.

MR. McMULLIN: Black man, elderly black lady, and young black lady?

MS. KOCH-CARROLL: Has he been sworn?

MR. McMULLIN: No. All I'm doing is [586] get him as a witness. In case something comes back I got his name.

MS. KOCH-CARROLL: Oh, okay.

MR. McMULLIN: I'll swear—what do you want me to swear to?

THE BAILIFF: Jury coming in, please.

[Jury in at 1:18 p.m.]

* * * *

[589] THE COURT: All right. That's what will be done. After jury retires, the bailiff will take up the assembled exhibits that have been admitted into evidence.

All right. Now, does the defense rest?

MR. McMULLIN: Yes, sir. For the record, to protect my record, I had three more witnesses, the stepfather, Mr. James Edwards who I subpoenaed; the defendant's mother, Gladys Edwards, who I subpoenaed; and older sister, Laura Lee, that I subpoenaed.

[Counsel approached the bench, and the following proceedings were had:]

MS. KOCH-CARROLL: Mr. McMullin, do we want to do this out loud in front of the jury?

[Proceedings returned to open court:]

The COURT: They're not here, are they?

[590] MR. McMULLIN: Now, they couldn't—

THE COURT: All right.

MR. McMULLIN: They were here and have gone.

THE COURT: All right.

MR. McMULLIN: They came from California. I don't know why they've gone.

THE COURT: All right. Okay.

So the defense rests?

MR. McMULLIN: So the defense rests.

THE COURT: All right. Thank you.

* * * *

[Excerpt from Defendant's Closing Argument]

[618] gets on—and I heard the tape of one of them, of Mr. Williams, who says a man named Reggie Rhodes was driving the truck.

Ladies and gentlemen, I'm an old man, been in this business 43 years, seen a little of criminal cases. Never seen one as weak as this. But it's up to you. You can go out here if you got a good conscience and say, "What the devil, just another black man, let's find him guilty and get out of here and let's all go home." That ain't justice, and I don't think you'll do that in Jackson County. And if a jury ever did, God help any of us if they're going to convict on testimony like this.

Not one piece of scientific evidence. No motive. Nothing except the statement of those two people. And it's very rare that a lawyer can impeach as thoroughly the two witnesses

for the State as I was able to do in this case. And I was able to do it because nothing is as powerful as the truth.

I know you'll do what's right. There are a lot of little things I can't mention, and I'm sure she'll bring them up.

I do apologize. I don't know what happened [619] to my witnesses. They're not here. Couldn't put them on on the question of alibi. But even without that, it hinges on whether or not you could convict a man of murder in the first or second degree from testimony of Sanders and the other man, Willie—Reggie Williams. That is the issue.

I ask you to do what's right. I ask you to think about it, discuss it with each other, and I think that you will bring in a verdict of not guilty. I do not believe that you could in good conscience find a man guilty of Murder I or Murder II on the uncorroborated testimony of those two people. Not one piece of evidence.

Your Honor, I have nothing further. Thank you very much.

THE COURT: All right. Prosecutor, you may proceed.

MR. McMULLIN: Judge, I'm going to return—you might check them to be sure they're all there and in order—the instructions.

STATE'S CLOSING ARGUMENT

MS. KOCH-CARROLL: That last little speech that Mr. McMullin made about this being

* * * *

[Excerpt from Prosecutor's Closing Argument]

[624] getting stared down and you think something is going to go down as Will Sanders said, and you're scared to death, you're so scared you run from the police initially after you see this guy shot in cold blood, what do you think? Three

seconds? Ten seconds? Is that a huge margin of difference? I don't think so.

All the evidence in this case has pointed to the fact that Reginald Rhodes' was the shooter and this man drove the car. And that makes them guilty of at least murder in the second degree, if not murder in the first degree.

Where are those alibi witnesses that Mr. McMullin promised you from opening. They're not here.

No doubt Remon Lee was in town here on August 26th and August 27th.

Lynne Bryant has no reason to lie to you.

Will Sanders has no reason to lie to you. He doesn't want to be here. He doesn't want to be a witness to this offense. Neither did Reginald Williams. They were just kids. They didn't want to be a part of this. But unfortunately a guy got killed in front of their

* * * *

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Case No. CR93-0453
Division 11

STATE OF MISSOURI,

Plaintiff,

v.

REMON LEE,

Defendant.

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

COMES NOW the defendant herein, Remon Lee, by his attorney of record and respectfully moves this court for an order setting aside the finding of guilt of the jury herein of Thursday, February 28, 1994, in the above styled cause, and sustaining his Motion for Judgment of Acquittal at the Close of All the Evidence, or in the alternative, to grant him a new trial in accordance with Supreme Court Rule 29.11 for the following reasons among others:

1) The jury found the defendant guilty of Count I Murder in the First Degree, a Class A Felony, and Count II, Armed Criminal Action, a Class A felony.

2) The court erred in failing to sustain the defendant's Motion for Judgment for Acquittal at the Close of All the Evidence for the reason that the State failed to prove beyond a reasonable doubt that the defendant was involved' in the murder in driving the truck from which the actual shooter allegedly entered and left the scene. The State charged the defendant acted in concert with the shooter and the only

evidence to attempt to prove beyond a reasonable doubt that the defendant was the driver of the truck came from State's witness, Reggie Williams, who testified he was in a yard four houses down, saw the truck come by before the shooting, and he observed for two seconds as the truck went down the street and turned around, and for two seconds on return. He testified to four seconds in his deposition. At the trial, he testified that he observed the defendant driving the truck, observed him for two seconds as the truck first went by and for ten seconds on the return trip: then a car came by involving the victim and the shooter and parked: that the shooter got out of the victim's car, shot him, and 'then ran over and entered the truck driven by the defendant, and fled the scene. The State failed to prove beyond a reasonable doubt that the defendant knew that the shooter was going to shoot the victim, or get into his truck after the shooting.

3) That the court erred in failing to sustain the Defendant's Motion for Judgment of Acquittal at the Close of All the Evidence for the reason that the State's evidence on identification by Reggie Williams was insufficient as a matter of law to sustain a conviction for the reason that State's witness, Reggie Williams, admitted that he gave a recorded statement, which was played for the jury, to attorney, Robert Calbi, and Mr. Calbi's investigator, Freddy Macon in Mr. Calbi's office after the shooting, when Mr. Calbi was representing this defendant, in which he stated that he could not identify the defendant as the driver of the truck and a man named Reggie Rhodes was' the driver of the truck.

4) That the court erred in failing to sustain the Defendant's Motion for Judgment of Acquittal at the Close of All the Evidence for the reason that the State's witness, Willie Sanders, testified he was with State's witness, Reggie Williams, and they were playing with a Moped approximately four houses down from' the scene, that he saw a truck go by driven by the defendant, turn around and come back and park

for some half an hour, and that he saw the driver for approximately two seconds on the first pass by, and ten seconds on the second pass by, and saw the truck parked for approximately half an hour when the victim drive by in his car with the shooter and the victim parked, the shooter got out of the victim's car, went around to the driver's side, shot the victim, ran and jumped in the truck and sped away. He then testified that he had never been asked by the police at any time they questioned him if he could identify the driver of the truck, the defendant, and was never shown a photo line up or other line-up containing a picture of the defendant. On cross examination, confronted with a police report by Detective Wantland and Detective DeValkenaere, he admitted a few hours after the shooting, on the day of the shooting, that he was shown a photo line-up containing the defendant's picture and he was unable to identify the defendant as being the driver of the truck.

4) The court erred in failing to sustain the Motion for Judgment of Acquittal at the Close of All the Evidence for the reason that the court improperly injected itself into the case by taking over the questioning of State's witness, Willie Sanders, and asking the witness if he was positive he could identify the defendant whereupon the witness testified he was positive the defendant was the driver of the truck and the court then asked whether or not either lawyer had additional questions, and when defense counsel responded "I do", the court stated, "I'll bet you do" causing the jury to break into laughter. Thereafter, on cross examination, the State's witness, Willie Sanders, after having stated on direct examination and cross examination he had never been asked by the police if he knew who the driver of the truck was and had never been shown photos or a line-up . to see if he could pick the defendant out of the line-up, the police had indeed on the day of the shooting shown him a photo line-up of several black males including a picture of the defendant and that he had been unable to pick the defendant as the shooter. This

comment by the Judge that "I'll bet you do" in response to the Judge's question, "Does counsel have any further questions?", was improper and highly inflammatory.

5) That the court erred in failing to sustain the defendant's Motion for Judgment of Acquittal at the Close of All the Evidence for the reason that there was no scientific evidence, as admitted by the prosecutor in her voir dire, opening and closing statements, to tie the defendant to the crime, and that the prosecutor's case would rely wholly upon the alleged eye witness testimony of State's witness, Reggie Williams and Willie Sanders.

6) The State's evidence, when taken as a whole, failed to establish proof beyond a reasonable doubt that the defendant knew the shooter was going to shoot the victim, or was acting in concert with the shooter to kill the victim.

7) That while a motive is not required in a murder case, the State admitted in voir dire, open statement, and closing argument, that no motive for the defendant's participation in the crime had been proven beyond a reasonable doubt, and no motive for the defendant's alleged participation was proven beyond a reasonable doubt.

8) The State's evidence failed to prove beyond a reasonable doubt for the foregoing reasons, that the defendant was the driver of the get away truck, that he knew that the shooter was going to shoot the victim, or that the defendant acted in concert with the shooter.

9) That the court erred in failing to grant the defendant a continuance in the trial from Thursday noon until 9 a.m. the following morning on Friday, or to issue a body attachment for defense witnesses, James Edwards, stepfather of the defendant; Gladys Edwards, mother of defendant; and, Laura Lee, sister of the defendant, who had been subpoenaed and had appeared at 8:30 a.m. on Thursday, February 24, 1994, and were waiting in the witness room to testify on behalf of

the defendant. Defendant's attorney went to the witness room at 11 a.m. on Thursday, February 24, 1994, to get the witnesses and they had disappeared and a diligent search of the area was unable to find them. They had been subpoenaed on Monday, February 21, 1994, and the prosecutor's investigators had been allowed to talk to them on Tuesday, February 22, 1994, and they appeared in the courthouse on Thursday, February 25, 1994, but left with no notice to defendant or his counsel. That the failure of the court to give the defendant until the next morning to attempt to locate them, or to issue a body attachment for said witnesses who were to establish the alibi of the defendant as being in California, at his parent's house on August 27, 1992, at the time of the killing. The failure of the court to grant the defendant a reasonable continuance to attempt to find the witnesses, or the court to issue a body attachment, is prejudicial error and denied the defendant a fair trial.

WHEREFORE, the defendant prays the court to grant his Motion for Judgment of Acquittal, or in the alternative, for a New Trial in accordance with the law.

Respectfully submitted,

/s/ James L. McMullin
JAMES L. MCMULLIN #14788
1125 Grand Avenue, Suite 810
Kansas City, Missouri 64106
(816) 421-6979
FAX (816) 421-1524

ATTORNEY FOR DEFENDANT

IN THE CIRCUIT COURT OF MISSOURI
16th JUDICIAL CIRCUIT

Case No. CR92-0453

STATE OF MISSOURI,
Plaintiff,

v.

REMON LEE,
Defendant.

Honorable Anthony P. Nugent, Jr.
Sitting in Division 101

TRANSCRIPT OF SENTENCING PROCEEDINGS

On Tuesday, April 19, 1994, the above cause came on for hearing before the Honorable Anthony P. Nugent , Jr., sitting in Division 101 of the Jackson County Circuit Court at Kansas City, Missouri.

APPEARANCES

The State of Missouri was represented by Ms. Linda Koch-Carroll, Assistant Prosecuting Attorney, Jackson County, Missouri.

The Defendant was present in person and represented by his attorney, Mr. James L. McMullin, 810 Merchants Bank Building, 1125 Grand Avenue, Kansas City, MO.

* * * *

[8] DEFENDANT: No.

THE COURT: The only sentence that the Court can impose in this case, as I understand it, is a sentence of life in the custody of the Department of Corrections of the State of Missouri without the opportunity of parole or probation on Count I, the Murder First Degree conviction.

On Count II, the maximum on that —

MR. McMULLIN: Is life. Three to life, Judge. We would ask for something less.

THE COURT: As to Count II, then, it is less than life.

SENTENCING

So in accordance with the laws of the State of Missouri, the Court now imposes upon Remon Lee, the Defendant in this case, of Count I, a sentence of life in prison without the benefit of parole or possibility of probation.

And as to Count II, the Court imposes a sentence on the Armed Criminal Action Statute of ten years in the custody of the Department of Corrections of the State of Missouri.

Now, I have a further duty, Mr. Lee, of advising you as to something about which I know you are already aware, but I have to advise you [9] that you have a Right to Appeal and the Right to Counsel. If you are unable to pay the cost of the appeal, you may have a Court—appointed counsel represent you in that appeal and proceed in forma pauperis.

Are you in a position to pay counsel to handle your appeal?

DEFENDANT: No, Sir.

THE COURT: That being the case, I would like to relieve Mr. McMullin of his duties in this case. And I will direct that the Public Defender of the State of Missouri undertake to represent you in the appeal in this case.

Now, I also have a further duty in the case where you have been convicted, as you have in this case, and judgment being entered as it just has, to advise you that you have a right in this case under Rule 29.15 of the Rules of Criminal Procedure of the State of Missouri in the event that you think counsel did not adequately represent you in your defense in this case.

And I'd like to ask you a few questions about that now.

Mr. McMullin represented you during the trial, isn't that correct?

[10] DEFENDANT: Yes.

THE COURT: Were you satisfied with the representation that he gave you in the trial of this case?

DEFENDANT: Yes, Sir. I was satisfied with Mr. McMullin's represent—the way he represented me.

THE COURT: You had an earlier attorney, didn't you?

DEFENDANT: Yeah. Robert Cowden.

THE COURT: And you were not satisfied with Mr. Cowden's services?

DEFENDANT: No, Sir.

THE COURT: All right. Let me ask you another question or two. Did Mr. McMullin do everything you asked him to do in the preparation for and in the trial of this case?

DEFENDANT: Yes. He did everything, but I wanted a witness that had pled guilty to this case to come and testify that I had no involvement of this crime.

THE COURT: Right.

DEFENDANT: And nobody ever do that. And I wanted him at my trial.

THE COURT: Okay, did you call this to [11] your counsel's attention—Mr. McMullin?

DEFENDANT: Yes.

THE COURT: And did you know why that witness did not appear?

DEFENDANT: No, Sir.

THE COURT: Was there anything else that happened in the course of the preparation for the trial or the trial itself to which you would like to call the Court's attention now about the advice you got or the representation you got by counsel?

DEFENDANT: From McMullin?

THE COURT: From McMullin?

DEFENDANT: I think he did a wonderful job.

THE COURT: You don't think it was Mr. McMullin's fault that that witness did not appear?

DEFENDANT: Well, I can't say, because I'm not affected by it. But I wanted him at my trial.

THE COURT: You wanted Mr. McMullin?

DEFENDANT: No. I'm talking about the witness.

THE COURT: The witness. Excuse me.

DEFENDANT: Yes.

THE COURT: All right. Now in addition [12] to the question of whether or not he did everything you wanted him to do, is there anything he did that you did not want him to do—Mr. McMullin—in the course of preparation for or conducting this trial?

DEFENDANT: No, Sir.

THE COURT: All right. That being the case, I am obliged to make a determination *as* to whether probable cause exists to believe that the Defendant has received ineffective assistance of counsel.

So far as I know, nothing appears in the record nor in my memory that would lead me to believe that Mr. McMullin ineffectively assisted you in the course of preparing for trial or in trying this case, and I so find there is no probable cause to believe that Mr. McMullin has failed you in any way.

Therefore, it is the judgment of this Court as heretofore stated that you be imprisoned in the Department of Corrections for the rest of your natural life without the benefit of parole or probation under Count I, and for ten years under Count II.

Is there anything else?

[13] MR. McMULLIN: Yes, Judge. I might respond. I am surprised, as I don't recall him ever before, during or after the trial mentioning that witness or I would have had him there. But we tried to get all of the witnesses that we could in. And I think his mother and father—your mother and father were here, too, then?

DEFENDANT: Yes.

MR. McMULLIN: And they left before they could testify. They went back to California.

But I subpoenaed all that I could. But I would like to ask him a question if I could.

THE COURT: Would you ask him the name of the witness?

MR. McMULLIN: Yes, Sir. I will.

EXAMINATION BY MR. MCMULLIN:

Q. What was the name of the witness that you say had pled guilty?
A. Reginald Rhodes.
Q. And he had pled guilty to this crime?
A. Yes.

Q. And had you talked to him?

A. Well, we talked on three-way phones, and we wrote each other letters. And he said that he would come to Court and testify that I had no [14] involvement in this crime, that I wasn't present, that I had no knowledge of it.

Q. I see. Well, I have no recollection at all. I'll check my file again, but I have no recollection at all of you ever telling me about that, or I would certainly have had him there if I could.

In my opinion, even if he had testified that—did he plead guilty to the same crime?

A. Yes.

Q. In my opinion, I doubt very much if a jury would believe you. It's been my experience in 40 years of trying criminal cases that they wouldn't believe him anyway to exonerate you completely in view of the State's testimony. But I will check mine, but I have no recollection.

THE COURT: Mr. McMullin, my recollection of it is that Rhodes was tried by a jury and was found guilty, is that correct?

MR. McMULLIN: No. He pled guilty I think.

MS. KOCH-CARROLL: No, Your Honor. He pled.

THE COURT: Okay. Did he plead guilty before this trial?

MR. McMULLIN: Yes, Sir.

[15] MS. KOCH-CARROLL: Yes.

THE COURT: Okay. Well, my recollection is mistaken.

MR. McMULLIN: It'll check my file, but I'm sure he believes that.

Q. (By Mr. McMullin) But we discussed your case at length many times—several times and getting your family back, didn't we?

A. Yes. I'm positive of—in fact, I know I mentioned that witness to you—that I wanted him there.

Q. Well, I have no recollection. I'll check my file, but I'm sure I would have had him there.

But did you have any complaints, Sir, about any other way I handled the case?

A. No. No.

THE COURT: Do you know whether or not Mr. Rhodes would have agreed to this—

DEFENDANT: Yes. He agreed. He had plans on coming. Then when no one never subpoenaed him, he wrote me and asked me why haven't he been subpoenaed and why haven't no one came and got him yet. Arid I told him my trial was over with, and they found me guilty.

Q. (By Mr. McMullin) Sir, I take it your [16] recollection is you told me about that before trial?

A. Before trial. Yes.

Q. Why didn't you tell me about it during the trial so we could at least sent the subpoena or writ out?

A. Well, my understanding—I had told you about all the witnesses I want, and you had told me you have subpoenaed everyone. And then—

Q. But I told you in advance who our witnesses were going to be. Don't you remember? Your mother, your father and your sister?

A. Right.

Q. And you made no mention of this other witness you're talking about. Why didn't you say, "Well, you didn't get that guy for me."?

A. You had told me in the visiting room over at the county jail that wouldn't no jury believe him anyway.

Q. I'm sure I did. Just like I told you now.

A. And if I had to take the stand, there wouldn't be no jury believe me on a stack of bibles. That's the reason why I didn't take the stand. And that's the reason I assume Reginald Rhodes didn't come back.

[17] Q. Did we make a record that you had a right to testify or not to testify? I thought we did.

A. Yes, but—I mean you had agreed—I had agreed with you that I didn't want to testify. We had an agreement on that.

Q. I see.

MR. McMULLIN: I have nothing further, Judge.

THE COURT: Anything else?

MR. McMULLIN: No, Sir.

THE COURT: That being the case—

MR. McMULLIN: Judge, could I get a copy of that order as soon as possible? We only have ten days starting tomorrow to get the Public Defender to file an appeal on him. And I want to be doggone sure that they get it in time so his appeal will go in.

THE COURT: Which order are you referring to?

MR. McMULLIN: The sentencing order and appointing—it'll all be in one order.

THE CLERK: I'll do it today and have you sign it.

THE COURT: Oh, okay.

MS. KOCH-CARROLL: Judge, the Notice of [18] Appeal—and I may be wrong. Mr. McMullin obviously does this end of things more often than I do. But usually the trial attorney goes ahead and files the Notice of Appeal. Does that get you into something?

MR. McMULLIN: I respectfully disagree, because I don't have to spend my money to file the appeal, see? So sometimes they do it—

MS. KOCH-CARROLL: I didn't know the Notice of Appeal involved expenditure of funds. I filed one appeal in my lifetime.

MR. McMULLIN: See, I've been relieved. Now, since I've been relieved, I'd have to pay money. If they'll put in that order, as the Judge has, that I'm relieved, and the Public Defender is appointed to handle the appeal and I get a copy of it, I'll rush it over to the Public Defender. Sometimes in transporting it back and forth it doesn't get there. And that way it will be filed on time.

THE COURT: Well, you can go ahead and file your Notice of Appeal and—

MR. McMULLIN: I can't, Judge. I've been relieved. And what I need is a copy—she'll get me a copy of the order within ten days.

[19] I'll get it over to the Public Defender, and we'll see that it's filed. But, see, when I'm relieved, the Criminal Records won't file it without a filing fee and the Public Defender is appointed. So I'll get it over.

THE COURT: I guess I have relieved you of your duties. Haven't I?

MR. McMULLIN: Yes, Sir.

THE COURT: So if the Clerk will furnish Mr. McMullin with a copy of the order—

MR. McMULLIN: Within ten days, we're fine.

THE COURT: All right.

Court's adjourned.

* * * *

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CASE NO. CR93-0453
DOCKET Q

STATE OF MISSOURI

Plaintiff,

vs.

REMON M. LEE, DOB 7/10/66,

Defendant.

JUDGMENT

(Jury Trial - No Probation)

On April 19, 1994, came the attorney for the State, Linda Koch-Carroll, and defendant appeared in person and by attorney, Jim McMullin.

The Court having heard the arguments of counsel, and having been fully advised in the premises, hereby overrules defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury, or in the Alternative, for a New Trial.

Defendant having been found guilty on February 24, 1994, upon a plea of not guilty and a verdict of guilty of the offense(s) of: Count I-Murder in the First Degree, Class A Felony and Count II-Armed Criminal Action, Class A Felony of the Information; and the Court having informed the defendant of the verdicts and having asked defendant whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court;

IT IS ADJUDGED that defendant is guilty of said offense(s) as found by the jury.

IT IS ORDERED AND ADJUDGED that defendant is sentenced and committed to the custody of the Missouri Department of Corrections and Human Resources for a period of Life Without Parole on Count I and ten (10) years on Count II, each to run concurrently;

IT IS FURTHER ORDERED that. defendant be given credit for all time served on the charge(s) herein.

IT IS FURTHER ORDERED that the Court Administrator deliver a copy of this Judgment and Commitment to the Jackson County Department of Corrections, and that said copy serve as the commitment of the defendant.

IT IS FURTHER ORDERED that the State of Missouri have and recover from the defendant the sum of $68.00 for the Crime Victims Compensation Fund, and that execution issue therefor.

IT IS FURTHER ORDERED that the Court finds no probable cause to believe that defendant had inadequate or ineffective assistance of counsel.

Defendant has been advised of his rights pursuant to Supreme Court Rule 24.035 or 29.15.

IT IS FURTHER ORDERED that Defendant is remanded to the custody of the Jackson County Department of Corrections for safekeeping and to await transport to the Missouri Division of Adult Institutions.

IT IS FURTHER ORDERED that the Court hereby grants leave for Jim McMullin to withdraw from the case and the Appellate Public Defender is appointed to represent the defendant on appeal

Signed: This 19th day of April, 1994.

/s/ Anthony P. Nugent, Senior Judge
ANTHONY P. NUGENT, Senior Judge
Sitting in Division 101

I hereby certify that copies of the forgoing order were duly delivered this 14th day of April, 1994, to:

Assistant Prosecuting Attorney.
Attorney for Defendant
Jackson County Department of Corrections
State Board of Probation and Parole
Criminal Data Entry
Criminal Section
/s/ Debbie Guy
DEBBIE GUY, Division Clerk

50

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS

MOTION TO VACATE, SET ASIDE OR CORRECT THE JUDGMENT OR SENTENCE

FORM NUMBER 40

IN THE CIRCUIT COURT OF **JACKSON COUNTY, MISSOURI** COUNTY, STATE OF MISSOURI

FULL NAME OF MOVANT
REMON M. LEE

VS.

STATE OF MISSOURI
RESPONDENT

CASE NO **CV94-28462** SJ
(TO BE SUPPLIED BY THE CLERK OF THE CIRCUIT COURT)

INSTRUCTIONS - READ CAREFULLY

In order for this motion to receive consideration by the Circuit Court, it shall be in writing (legibly handwritten or typewritten), signed by the movant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, movant may furnish his answer to a particular question on the reverse side of the page or an additional blank page. Movant shall make it clear to which question any such continued answer refers.

This motion must be filed in the Circuit Court which imposed sentence.

The movant is required to include in this motion every ground known to him for vacating, setting aside or correcting his conviction and sentence or it will be waived or abandoned. Be sure to include every ground.

Since every motion must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for making a false affidavit. Movants should therefore exercise care to assure that all answers are true and correct.

If the motion is taken *in forma pauperis*, it shall include an affidavit setting forth information that establishes that movant will be unable to pay costs of the proceedings. When the motion is completed, the original and two copies shall be mailed to the Clerk of the Circuit Court from which he was sentenced.

MOTION:

1. PLACE OF DETENTION
Potosi Correctional Center, Rt. 2, Box 2222, Mineral Point, MO. 63660

2. NAME AND LOCATION OF COURT WHICH IMPOSED SENTENCE
The Circuit Court of Jackson County, Missouri in Division 11
Kansas City, Missouri 64106

3. THE CASE NUMBER AND THE OFFENSE OR OFFENSES FOR WHICH SENTENCE WAS IMPOSED
Cause No. CR93-0453

4A. THE DATE UPON WHICH SENTENCE WAS IMPOSED AND THE TERMS OF THE SENTENCE
Sentenced on April 19, 1994 to Count I. Murder First Degree and Count II. Armed Criminal Action. Count I. Life w/o Parole and Count II. 10 years concur

4B. THE DATE UPON WHICH YOU WERE DELIVERED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS TO SERVE THE SENTENCE YOU WISH TO CHALLENGE
May 31st, 1994

5. CHECK WHETHER A FINDING OF GUILTY WAS MADE
- [X] (A) AFTER A PLEA OF GUILTY
- [ ] (B) AFTER A PLEA OF NOT GUILTY

6. DID YOU APPEAL FROM THE JUDGMENT OF CONVICTION?
- [ ] YES
- [X] NO

IF YOU ANSWERED "YES" TO (6), LIST

7A. THE NAME OF THE COURT TO WHICH YOU APPEALED
*** APPEAL STAYED PENDING RESULT OF 29.15 CIRCUIT COURT PROCEEDINGS.**

7B. THE RESULT IN SUCH COURT AND THE DATE OF SUCH RESULT.
N/A

8. STATE CONCISELY ALL THE GROUNDS KNOWN TO YOU FOR VACATING, SETTING ASIDE OR CORRECTING YOUR CONVICTION AND SENTENCE:

(A) *** SEE ATTACHED PAGES FOR ALL GROUNDS OF RELIEF SOUGHT.**

(B)

(C)

[redacted]

EXHIBIT A

45

BEST AVAILABLE COPY

Movant submits that his alibi was that he was not present at the time of the offense was alleged to have occurred and further that the offense could not have occurred as the state contends and the evidence as the state submitted it. This was the heart of movants defense, that he was with James I. Gladys Edwards (William) and Laura Lee who resides in Ventura, California, who would/will testify that in July 92 was to come out to Venture for a birthday party and did not leave until late October 92. Failing to instruct the Jury concerning movant's alibi defense clearly demonstrates that movant counsel's skill fell far below an objective standard of reasonableness and resulted in prejudice to movant's case since the jury was never instructed on the crucial fact that the state the burden of proving movant's presence at the place and at the time wherein the offense was alleged to have occurred in view of the fact the state's star witness gave variances as to the identify of the driver of the truck, in *McClain vs. State*. 560 S.W. 2d 894 (Mo. App 1978), the court stated that the defense attorney was not ineffective in failing to request an aibi instruction when under the circumstances of that case, defense counsel might have concluded that to emphasize alibi testimony concerning alleged homosexuality of certain defense witnesses which would be morslip offensive to the jury. However, in the instances case, the testimony and evidence as well as the rebuttal testimony presented was not morally offensive and therefor, there was no justiciable reason for movant's attorney to not request an aibi instruction, and his failure to do so constituted ineffective assistance of counsel.

In support of this submission movant will rely on the transcript, legal file, testimony of JAMES & GLADYS EDWARDS, LAURA LEE, testimony of TRIAL COUNSEL, and the testimony of movant, and any other evidence and witnesses as may be found pursuant to further investigation and discovery.

Movant's Counsel did not file an objection with the court nor did he lodge his motion to modify the said instruction nor preserve the issue within the movant's motion for new trial.

The United States Supreme Court in *Holland vs. United States*, 348 U.S. 121, 140 (1954), suggested an acceptable definition would define reasonable doubt as "the kind of doubt that would make a person hesitate to act." Deviation from the "hesistate to act" language have resulted in reversible error. *See Cage vs. Louisiana*, 111 S. Ct. 328 (1990), *Monk vs. Zeley*, 901 F2d 885, 889-90 (10th Cir. 1990), reversing convictions where reasonable doubt defined as a "substantial honest, conscientious doubt", *United States vs. Cambell*, 874 F.2d 838 843 (1st Cir. 1989)(warning that defining reasonable doubt as "a fair doubt would impose a lesser burden on the prosecutor). Movant acknowledges contrary authority to this argument. *See State vs. Antwine*, 743 S.W. 2d 51, 62-3 (Mo.banc 1987), *cert. denied*, 486 U.S. 1017 (1987). He present this point to provide the court the opportunity for reconsideration and to preserve the issue for appellate review. In support of this claim movant will rely upon the transcript and court file in cause no. CR93-0453, the testimony of movant, trial counsel, and *Judge Anthony R. Nugent*, and any other evidence and witnesses as may be found pursuant to further investigation and discovery.

b. Movant received ineffective assistance of counsel when movant's then counsel failed to submit an alibi instruction to the jury supporting his defense that he did not commit the alleged homicide. The failure of counsel to so request the said instruction on alibi violated his rights under the 5th, 6th, and 14th amendments to the United States Constitution as well as Art. 1, Sec 2, 10, 18(a) and 22(a) of the CONST. OF MO. and those rights under 29.15(i) by counsel causing an illegal judgement of conviction and sentence to be imposed upon the movant herein.

Movant will introduce his legal file containing his instructions is devoid of an alibi instruction upon his defense that he was not present at the time of the alleged homicide commission. Movant will take the stand and testify to these facts and much much more.

Movant will introduce two alibi defense instructions that were reasonably available to counsel and would have been issued to the jury upon him requesting the same. The said alibi defense instructions read as follows:

308.04 ALIBI:

One of the issues (in this case) is whether the Defendant was present at the time and place the offense is alleged to have been committed. On that issue you are instructed as follows:

1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed.

2. If the evidence in this case leaves in your mid a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed, then you must find the defendant not guilty. MAI-CR3d 308.04 (1987)

308.06 ALIBI: (ONLY IF REQUESTED IN THIS FORM)

One of the issues (in this case) is whether the defendant was present at the time and place the offense is alleged to have been committed. On that issue you are instructed as follows:

1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed.

2. If the defendant was (in) (at) (place) at the time the alleged offense was committed, or if you do not find that the defendant was present at the time and place the offense is alleged to have been committed, then you must find the defendant not guilty.

MAI-CR3rd (1987)

APPLICATION FOR POST CONVICTION RELIEF

1. Movant was denied his right to the effective assistance of counsel and due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 and 18(a) of the Missouri Constitution, when:

a. Trial Counsel failed in his duties to object to the giving of Instruction No. 4 in the trial of Movant's case, as well as his failure to file a motion to modify reasonable doubt instruction because the said instruction violated the movant's rights to effective assistance of counsel rights to due process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I Section 10 of the MO. CONST., in that said instruction equates proof beyond a reasonable doubt with the lesser civil standard of "clear and convincing" evidence, and thereby dilutes the state's burden of proof in criminal cases.

The actions Committed and the actions committed by counsel prejudiced the movant's right to a fair trial as the instruction misinformed the jury as to the standard of proof that must be met by the state's attorney. A reasonable Competent attorney rendering similar services under the existing circumstances, See *Strickland vs. Washington*, 104 S.Ct. 2052 (1984), would have objected to the use of such instruction as well as filed a motion to modify the same because he would have wanted his client to have a fair trial and a fair trial would have consisted of movant's counsel's objection's and motion to modify the reasonable doubt instruction. Movant was prejudiced by counsel's actions because he was convicted based upon evidence that was diluted by a standard of proof given by definition of the probative evidence which requires proof beyond a reasonable doubt.

Movant submits that, in defining proof beyond a reasonable doubt as proof that leaves jurors "firmly convinced", the trial court diminished the meaning of reasonable, thereby violating his right to due process of law as guaranteed by the state and federal constitutions.

(b) THE PROCEEDINGS IN WHICH EACH GR[illegible] WAS RAISED

N/A

(c) IF YOU HAVE FILED PRIOR PROCEEDINGS IN ANY STATE OR FEDERAL COURT INVOLVING THIS SAME SENTENCE BUT DID NOT RAISE THEREIN ON[illegible] OR MORE OF THE GROUNDS YOU NOW LIST IN (8). STATE WHICH WERE NOT RAISED IN THE EARLIER PROCEEDINGS AND WHY THEY WERE NOT RAISE[illegible] IN THOSE PROCEEDINGS

a. N/A

b.

c.

(9) WERE YOU REPRESENTED BY AN ATTORNEY AT ANY TIME DURING THIS COURSE OF

a. YOUR PRELIMINARY HEARING? ☐ YES ☐ NO N/A Did not Have Preliminary Hearing.
b. YOUR ARRAIGNMENT AND PLEA? ☒ YES ☐ NO
c. YOUR TRIAL, IF ANY? ☒ YES ☐ NO
d. YOUR SENTENCING? ☒ YES ☐ NO
e. YOUR APPEAL, IF ANY FROM THE JUDGMENT OF CONVICTION OR THE IMPOSITION OF SENTENCE? ☐ YES ☒ NO
f. PREPARATION, PRESENTATION OR CONSIDERATION OF ANY PETITIONS, MOTIONS OR APPLICATIONS WITH RESPECT TO THIS CONVICTION, WHIC[illegible] YOU FILED? ☐ YES ☒ NO

(10) IF YOU ANSWER "YES" TO ONE OR MORE PARTS OF (9), LIST

(a) NAME AND ADDRESS OF EACH ATTORNEY WHO REPRESENTED YOU:

James D. McMullin, 1125 Grand Ave. Suite 810, Kansas City, MO 64106
Robert Calbi, 912 Baltimore, Suite 400, Kansas City, MO

(b) THE PROCEEDINGS AT WHICH EACH SUCH ATTORNEY REPRESENTED YOU:

Mr. McMullin; C and D, above in Section 15
Mr. Calbi; D, above in Section 15

(11) ARE YOU NOW UNDER SENTENCE FROM ANY OTHER COURT THAT YOU HAVE NOT CHALLENGED? ☐ YES ☒ NO

(12) IF YOU ARE SEEKING TO PROCEED *IN FORMA PAUPERIS*, HAVE YOU COMPLETED THE SWORN AFFIDAVIT SETTING FORTH THE REQUIRED INFORMATI[illegible] SEE INSTRUCTIONS, PAGE 1 OF THIS FORM)? ☒ YES ☐ NO

SIGNATURE OF MOVANT

Renon Lee

RENON M. LEE, movant in this case, being duly sworn upon my oath state that I ha[illegible] subscribed to the foregoing petition; that I know the contents thereof; that the above information is, to the best of my knowledge, true and correct; th[illegible] I have listed every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that I understa[illegible] that I waive any ground for relief known to me that I have not listed in this motion.

SIGNATURE OF MOVANT

Renon Lee

[illegible] NOTARY SEAL

STATE OF MISSOURI
COUNTY (OR CITY OF ST LOUIS): Washington
ON THIS: 17 DAY OF November 19 97
BEFC[illegible] MI
NAME OF NOTARY (PRINT OR TYPE): Sherry Lynn Wise
A NOTARY PUBLIC IN AND FOR SAID STA[illegible] PERSONALLY APPEARED
NAME OF INDIVIDUAL (PRINT OR TYPE): Renon Lee
KNOWN TO ME TO BE THE PERSON W[illegible] EXECUTED THE WITHIN
TYPE OF DOCUMENT: 27.15
AND ACKNOWLEDGE TO ME THAT HE/SHE EXECUTED THE SAME I[illegible] THE PURPOSES THEREIN STATED
NOTARY PUBLIC SIGNATURE: Sherry Lynn Wise
MY COMMISSION EXPIRES: DEC 23, 1997
USE RUBBER STAMP HERE

SHERRY LYNN WISE
Notary Public - Notary Seal
STATE OF MISSOURI
Washington County
My Commission Expires: December 23, 1997

[illegible] 93-1347 (7-96)

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[illegible] 93-1347 (7-96)

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51

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56

(8) THE PROCEEDINGS IN WHICH EACH GR[illegible] WAS RAISED

N/A

(9) IF YOU HAVE FILED PRIOR PROCEEDINGS IN ANY STATE OR FEDERAL COURT INVOLVING THIS SAME SENTENCE BUT DID NOT RAISE THEREIN ON OR MORE OF THE GROUNDS YOU NOW LIST IN (8), STATE WHICH WERE NOT RAISED IN THE EARLIER PROCEEDINGS AND WHY THEY WERE NOT RAISE IN THOSE PROCEEDINGS

a. N/A

b.

c.

(10) WERE YOU REPRESENTED BY AN ATTORNEY AT ANY TIME DURING THIS COURSE OF

a. YOUR PRELIMINARY HEARING? ☐ YES ☐ NO N/A Did not Have Preliminary Hearing.

b. YOUR ARRAIGNMENT AND PLEA? ☒ YES ☐ NO

c. YOUR TRIAL, IF ANY? ☒ YES ☐ NO

d. YOUR SENTENCING? ☒ YES ☐ NO

e. YOUR APPEAL, IF ANY FROM THE JUDGMENT OF CONVICTION OR THE IMPOSITION OF SENTENCE? ☐ YES ☒ NO

f. PREPARATION, PRESENTATION OR CONSIDERATION OF ANY PETITIONS, MOTIONS OR APPLICATIONS WITH RESPECT TO THIS CONVICTION, WHIC YOU FILED? ☐ YES ☒ NO

(11) IF YOU ANSWER "YES" TO ONE OR MORE PARTS OF (10), LIST

[illegible] AND ADDRESS OF EACH ATTORNEY WHO REPRESENTED YOU:

James D. McMullin, 1125 Grand Ave. Suite 818, Kansas City, MO 64106
Robert Calbi, 912 Baltimore, Suite 400, Kansas City, MO

(12) THE PROCEEDINGS AT WHICH EACH SUCH ATTORNEY REPRESENTED YOU:

Mr. McMullin; C and D, above in Section 15
Mr. Calbi; B, above in Section 15

(13) ARE YOU NOW UNDER SENTENCE FROM ANY OTHER COURT THAT YOU HAVE NOT CHALLENGED? ☐ YES ☒ NO

(14) IF YOU ARE SEEKING TO PROCEED *IN FORMA PAUPERIS*, HAVE YOU COMPLETED THE SWORN AFFIDAVIT SETTING FORTH THE REQUIRED INFORMATI SEE INSTRUCTIONS, PAGE 1 OF THIS FORM)? ☒ YES ☐ NO

SIGNATURE OF MOVANT

~~RENON M. LEE~~ Renon Lee

, movant in this case, being duly sworn upon my oath state that I ha subscribed to the foregoing petition; that I know the contents thereof; that the above information is, to the best of my knowledge, true and correct; th I have listed every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that I understa that I waive any ground for relief known to me that I have not listed in this motion.

SIGNATURE OF MOVANT Renon Lee

[illegible] NOTARY SEAL	STATE OF MISSOURI	COUNTY (OR CITY OF ST. LOUIS) Washington	ON THIS 17 DAY OF November 94
	NAME OF NOTARY (PRINT OR TYPE) Sherry Lynn Wise		A NOTARY PUBLIC IN AND FOR SAID STA PERSONALLY APPEARED
	NAME OF INDIVIDUAL (PRINT OR TYPE) Renon Lee		KNOWN TO ME TO BE THE PERSON W EXECUTED THE WITHIN
	TYPE OF DOCUMENT 2.15	AND ACKNOWLEDGE TO ME THAT HE/SHE EXECUTED THE SAME THE PURPOSES THEREIN STATED	
	NOTARY PUBLIC SIGNATURE Sherry Lynn Wise		
	MY COMMISSION EXPIRES Dec 23, 1997	USE RUBBER STAMP HERE	SHERRY LYNN WISE Notary Public - Notary Seal STATE OF MISSOURI Washington County My Commission Expires: December 23, 1997

[illegible] 1347 (7-90)

52

FORMA PAUPERIS AFFIDAVIT

Movant deposes and says that he is a poor person within the meaning of the law; THAT he owns no stocks, bonds, cars, cash, or real estate to secure the [illegible] this action.

Kemon Lee

I, KEMON H. LEE, being first duly sworn upon my oath, depose and say that I have subscribed the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

SIGNATURE OF AFFIANT

Kemon Lee

NOTARY PUBLIC EMBOSSER SEAL

STATE OF MISSOURI

COUNTY (OR CITY OF ST. LOUIS)

Washington

SUBSCRIBED AND SWORN BEFORE ME, THIS 11 DAY OF November 1994

NOTARY PUBLIC SIGNATURE

Sherry Lynn Wise

MY COMMISSION EXPIRES

Dec 23, 1997

USE RUBBER STAMP IN CLEAR AREA BELO

NOTARY PUBLIC NAME (TYPED OR PRINTED)

Sherry Lynn Wise

SHERRY LYNN WISE
Notary Public - Notary Seal
STATE OF MISSOURI
Washington County
My Commission Expires: December 23, 1997

53

STATE OF MISSOURI)
) SS
COUNTY OF WASHINGTON)

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON, MISSOURI, STATE OF MISSOURI

REMON M. LEE,

nt,

vs.*Mova*

STATE OF MISSOURI,

Respondent.

VERIFIED REQUEST FOR EVIDENTIARY HEARING

Comes now Remon M. Lee movant in the above entitled cause of action, and consistent with Missouri Supreme Court Rules would make a request for an evidentiary hearing on the pending 29.15 Motion (State whether 29.15 or 24.035. hearings are granted under Rule 24.035(g) and Rule 29.15(g) on on written request verified prior to the amended motion being filed. The court then has 15 days to decide whether a hearing is required). The movant in this case request an evidentiary hearing on the following issues:

a. all issues contained in the original motion and the amended motion.

Additional hearing is required on:

The disqualification of the judge from presiding over this cause of action as it is reasonable possible that he may be called to appear as a witness to answer to a number of the submissions made by movant in the attached PCR Motion.

WHEREFORE, movant prays that this motion be sustained.

Respectfully, /s/ Remon M. Lee

I, Remon M. Lee, after first being duly sworn, depose, and swears that he has read the above and the matters therein are true and correct according to his best information, knowledge and belief.

/s/ Sherry Lynn Wise
Notary Public

/s/ Remon Lee
Affiant

Subscribed and sworn to before me this 17 day of November 1994

My Commission Expires: Dec 23, 1997

Proof of Service-----Copies mailed this 17th day of November 1994 to: /s/ Remon Lee

[Filed Jul. 3, 1995]

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CV94-28462

Division 3

REMON M. LEE,

Movant,

vs

State Of Missouri,

Respondent.

FIRST AMENDED APPLICATION FOR POSTCONVICTION RELIEF

CONES NOW MOVANT, Remon N. Lee, by and through undersigned counsel, and pursuant to Rule 29.15, files the following first amended motion for postconviction relief.

BACKGROUND

1. In *State v. Remon N. Lee*, CR93-0453, Movant was convicted after a trial by jury in the Circuit Court of Jackson County of one count of murder in the first degree, Section 565.020, RSMo, and one count of armed criminal action, Section 571.015, RSMo.

2. On April 19, 1994, the Honorable Anthony P. Nugent, Senior Judge, sentenced Movant to concurrent terms of life without parole on the count of murder and ten (10) years imprisonment on the count of armed criminal action.

3. Movant is currently incarcerated at the Potosi Correctional Center in Potosi, Missouri.

4. Movant filed a direct appeal from his conviction in CR93-0453. That appeal is suspended, pending resolution of this Rule 29.15 motion.

5. Movant was represented by Mr. James L. McMullin, 810 Merchants Bank Building, 1125 Grand Avenue, Kansas City, Missouri, 64106, at all times relevant to this motion.

7. Prior to this motion, Movant has not filed any other motions to vacate, petitions for habeas corpus, or petitions for certiorari in this or any other court, challenging his conviction or sentence in CR93-0453.

8. None of the grounds for relief set forth in this motion have been previously presented to this or any other court, state or federal, in any petition, motion, or application.

9. Movant is a poor person, as evidenced by this Court appointing the Office of Appellate Defender, Western District, to represent Movant on his Rule 29.15 motion.

APPLICATION FOR POSTCONVICTION RELIEF

1. Movant was denied his rights to due process of law and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and by the Missouri Constitution, Article I, Sections 10 and 18(a), when:

> a. Movant's alibi witnesses, James Edwards, Gladys Edwards, and Laura Lee were told by an unknown person that they could leave the courthouse because they were not needed to testify. In fact, Laura Lee and James and Gladys Edwards were essential witnesses for Movants defense, because Movant expected them to testify and establish he was visiting his family, including his parents, James and Gladys Edwards, in Ventura, California during the entire month of August, 1992.

The testimony of Laura Lee and James and Gladys Edwards was necessary for Movant's defense, since the state alleged Movant was the get-away driver for Reginald Rhodes in the August 27, 1992, shooting death of Steven Shelby.

As a result of Laura Lee and James and Gladys Edwards being told they were not needed to testify, Lee and the Edwards left the courthouse and were not present when Movant presented his evidence in chief. Defense counsel made a record with Movant that the witnesses had come from California to testify on Movant's behalf, were under subpoena for the defense, had been present in the courthouse that morning, and had left the courthouse sometime around 11:00 a.m. (Tr. 571-577). Defense counsel made an oral motion for continuance, which the trial court overruled (Tr. 579-580). Because his witnesses had left the courthouse under the mistaken impression that their testimony was not needed and therefore could not be found to testify, Movant was denied his rights to present evidence in his defense, to due process of law, and to the effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution. A reasonable probability exists that the result of the trial would have been different had Movant's alibi witnesses been called to testify that Movant was in California during August, 1992.

In support of this allegation, Movant will rely upon the transcripts and entire, court file in CR93-0453, the testimony of Movant, of Laura Lee, of James Edwards, of Gladys Edwards, and of trial counsel James L. McMullin, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

b. The trial court overruled defense counsel's motion for continuance. Laura Lee and James and Gladys Edwards were under subpoena by the defense and had been present in the courthouse on the morning of the last day of trial. While they were waiting to testify, an unknown person approached Lee and the Edwards and told them their testimony would not be needed. Lee and the Edwards left the courthouse and went to a relative's home to await news of the verdict. Although at the time neither counsel nor Movant knew where the alibi witnesses had gone or why they had left the courthouse, Movant had since learned that a person believed to have been employed by the Jackson County Prosecutor's Office told Movant's alibi witnesses that they could leave because their testimony was not needed. Defense counsel made an oral motion for continuance, but the trial court overruled the motion, because the trial judge's daughter was scheduled to have surgery the next morning. The court assumed Movant's alibi witnesses had abandoned Movant, although there was no evidence to indicate why the witnesses had left. Defense counsel did not object to the court's basis for denying the continuance.

Movant was denied his rights to a fair trial, to due process of law, to the effective assistance of counsel, to call witnesses in his defense, and to compulsory process, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution. The actions of the unknown person defeated Movant's right to compulsory process to obtain witnesses in his defense, by circumventing Movant's properly served subpoenas. Movant was denied his rights to due process of law and to a fair trial, because the trial judge elevated his personal interest in his daughter's surgery over Movant's interests in a fair

adjudication of the charges against him. The court assumed Movant's witnesses had abandoned him, and did not even consider that another judge may have been available to preside over what remained of Movant's trial, or that Movant may have been able to locate his witnesses that afternoon. Movant was prejudiced because trial counsel informed the jury during voir dire and opening statement that Movant's defense would be alibi. After defense counsel failed to present any evidence of alibi, the state commented on that fact in its closing argument (Tr. 624). A reasonable probability exists that the result of the trial would have been different had the court granted a brief continuance of te trial, since the jury may have chosen to believe the alibi testimony that Movant was in the state of California at the time Steve Shelby was killed.

In support of this allegation, Movant will rely upon the transcripts and entire court file in CR93-0453, the testimony of Movant and trial counsel James L. McMullin, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

c. Trial counsel James L. McMullin failed to adequatley consult with Movant about testifying on his own behalf at trial, after Movant's alibi witnesses mysteriously disappeared before they could be called to testify. Trial counsel informed Movant and the court he had no choice but to close the defense evidence without presenting the alibi testimony he had promised the jury during voir dire and opening statements. Defense counsel questioned Movant about whether he wanted to testify, but did not ensure that Movant understood that his failure to testify meant he would not be able to present his defense of alibi. Had counsel so advised Movant, Movant would have testified in his own behalf despite his prior convictions, in order to avoid giving up his defense of alibi.

In support of this allegation, Movant will rely upon the transcripts and entire court file in CR93-0453, the testimony of Movant, of trial counsel James L. McMullin, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

d. Trial counsel James L. McMullin failed to object to the trial court submitting the charge of murder in the first degree to the jury under Instruction Number 6, which did not require the jury to find that Movant deliberated in aiding or encouraging Reginald Rhodes to cause the death of Steve Shelby. Movant was charged with murder in the first degree under the theory that he acted with Rhodes in causing Shelby's death. Instruction Number 6 required the jury to find Reginald Rhodes caused the death of Steve Shelby by shooting him, that it was Rhodes' purpose to cause the death of Steve Shelby, that Rhodes killed Shelby after deliberation, and that Movant, with the purpose of promoting or furthering the death of Steve Shelby, aided or encouraged Rhodes in causing Shelby's death and reflected upon the matter coolly and fully.

A first degree murder verdict director premised on accomplice liability must require the jury to find the defendant, charged with aiding or encouraging the accomplice in causing the victim's death, "did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief." MAI-CR3d 304.04, Note on Use 7(b); *State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993). The verdict director in this case only required the jury to find Movant "reflected upon this matter cooly [sic] and fully". The verdict director in this case did not require a finding of deliberation on the part of Movant, and therefore was defective. Trial counsel was ineffective in failing to object to Instruction Number 6, because he allowed the

case to go to the jury under a verdict director which permitted the jury to find Movant guilty without first finding Movant had a culpable mental state. Instruction Number 6 erroneously permitted the jury to impute a finding that Rhodes deliberated to Movant. A reasonable probability exists that the result of the trial would have been different had the jury been required to also find Movant deliberated, since the state's evidence did not establish deliberation by Movant. The state could not prove Movant either deliberated or knew that Rhodes would shoot Shelby when he parked the truck near the place where Shelby was shot. Requiring the jury to find deliberation by Movant may well have resulted in Movant's acquittal or in Movant being found guilty of a lesser offense.

In support of this allegation, Movant will rely upon the transcripts and entire court file in CR93-0453, the testimony of Movant, of trial counsel James L. McMullin, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

e. Trial counsel James L. McMullin failed to object and request a mistrial when Steven Shelby's sister, Rhonda Shelby, testified she saw Movant near the scene of the shooting and in the presence of Reginald Rhodes the day before the shooting. Counsel had not investigated Rhonda Shelby prior to trial, appeared to be surprised at Rhonda Shelby's testimony, and failed to request a continuance or to conduct further investigation. Movant also asserts Rhonda Shelby was only called to testify because state's witness Reginald Williams' testimony was shown to be unreliable.

Movant further asserts that his codefendant Reginald Rhodes should have been called to testify at Movant's trial. Rhodes pleaded guilty to the offenses charged against Movant, and had informed Movant he would be

willing to testify on Movant's behalf to the fact that Movant had no prior knowledge of the offense and was not a willing or knowing participant. A reasonable probability exists that the result of the trial would have been different had counsel called Rhodes to testify, since Rhodes may have provided a defense for Movant.

In support of this allegation, Movant will rely upon the transcripts and entire court file in CR93-0453, the testimony of Movant, of trial counsel James L. McMullin, and of Reginald Rhodes, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

2. Movant hereby incorporates by reference, as if fully set forth herein, all allegations of error contained in his *pro se* motion. Movant's *pro se* motion and this amended motion contain all grounds known to Movant at this time for relief from his judgment and sentence. Movant does not waive any claim of which he does not have knowledge after the exercise of due diligence in investigating this case.

3. Movant hereby expressly requests an evidentiary hearing on the claims raised herein.

WHEREFORE, for the foregoing reasons, Movant respectfully requests that this Court grant an evidentiary hearing in this cause and, at the conclusion of such hearing, vacate Movant's convictions and sentences and grant Movant a new trial.

Respectfully submitted,

/s/ Susan L. Hogan
SUSAN L. HOGAN, #33194
Appellate Defender, Western District
Appellate/Postconviction Division
Office of State Public Defender
505 E. 13th Street, Suite 420
Kansas City, Missouri 64106-2865
Tel: 816/889-2029
Counsel for Movant

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed by the courier mail system to the Office of the Prosecuting Attorney, Jackson County Courthouse, Floor 7M, Kansas City, Missouri 64106, on this 3rd day of July, 1995.

/s/ Susan L. Hogan
SUSAN L. HOGAN

VERIFICATION

I, Remon N. Lee, Movant in this case, being duly sworn upon my oath state that I have read the foregoing Amended Motion; that I know the contents thereof; that the above information is, to the best of my knowledge, true and correct; that I have listed every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that I understand that I waive any ground for relief known to me that I have not listed in this motion.

/s/ Remon M. Lee
REMON M. LEE

SUBSCRIBED AND SWORN to before me this 29th day of June, 1995.

/s/ Tamia Lewis
TAMIA LEWIS
Notary Public

Tamia Lewis
Notary Public State Of Missouri
My Commission Exp. Nov. 21, 1998
My Commission Expires:

[SEAL]

[Filed Jul 3 1995]

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI AT KANSAS CITY

CV94-28462
Division 3

REMON E. LEE,

Movant,

vs

STATE OF MISSOURI,

Respondent.

REQUEST FOR A HEARING DATE

COMES NOW Movant, by and through counsel, and requests Court to set a hearing date for Movant's Postconviction Motion. Movant requests that he be permitted to personally at the hearing.

WHEREFORE, Movant requests a hearing.

Respectfully submitted

/s/ Susan L. Hogan
SUSAN L. HOGAN, #33194
Appellate Defender, Western District
Appellate/Postconviction Division
Office of State Public Defender
505 E. 13th Street, Suite 420
Kansas City, Missouri 64106-2865
Tel: 816/889-2029
Counsel for Movant

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/s/ Susan L. Hogan
SUSAN L. HOGAN

[SEAL]

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CV94-028462
Division 3

REMON M. LEE,
Movant,

v.

STATE OF MISSOURI,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having reviewed and considered the pleadings and record on file in the hereinabove-styled and numbered cause, finds and concludes that Movant's Request for Evidentiary Hearing and Pro Se and Amended Applications for Post-conviction Relief pursuant to Missouri Supreme Court Rule 29.15, should be and are hereby overruled, and further makes Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. On February 24, 1994, in *State of Missouri v. Remon M. Lee*, CR93-0453, a jury found Movant guilty of one count of murder in the first degree, Mo. Rev. Stat. § 565.020 (1978), and one count of armed criminal action, Mo. Rev. Stat. § 571.015 (1978), in the Circuit Court of Jackson County, Missouri, before the Honorable Anthony P. Nugent, Senior Judge.

2. On April 19, 1994, Judge Nugent sentenced Movant to life without parole on the count of murder in the first degree and ten (10) years imprisonment on the count of armed criminal action, to be served concurrently in the Missouri Department of Corrections.

3. Mr. James L. McMullin, 810 Merchants Bank Building, 1125 Grand Avenue, Kansas City, Missouri, 64106, represented Movant at trial.

4. On April 19, 1994, Movant filed a direct appeal from his conviction in CR93-0453 with the Missouri Court of Appeals-Western District. The Court of Appeals has suspended the appeal, pending resolution of this motion for post-conviction relief.

5. On April 26, 1994, correction officials delivered Movant to the Fulton Reception and Diagnostic Center, Fulton, Missouri. Fulton officials subsequently transferred Movant to the Potosi Correction Center, Mineral Point, Missouri.

6. On October 26, 1994, Movant filed his record on appeal with the Missouri Court of Appeals-Western District.

7. On November 17, 1994, Movant filed his pro se motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15.

8. On May 2, 1995, the Court appointed the Appellate Defender-Western District to represent Movant in his post-conviction relief effort.

9. On July 3, 1995, Susan L. Hogan, newly appointed attorney for Movant, filed an amended motion for post-conviction relief. The Court had previously granted a thirty (30) day extension to file such motion.

10. On July 13, 1995, Respondent filed suggestions in opposition to Movant's pro se and amended motions.

CONCLUSIONS OF LAW

AMENDED MOTION

1. In order to prevail on a claim of ineffective assistance of counsel, Movant must establish, by a preponderance of the evidence, (1) that defense attorney's performance was deficient, *i.e.* that he failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under the circumstances, and (2) that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc 1984). Prejudice exists only where Movant can show a "reasonable probability" that, but for defense counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687; Harris, 870 S.W.2d at 814.

2. Defense counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690. In order to overcome this presumption of competency and prevail on a claim of ineffective assistance of counsel, Movant bears the burden of showing that defense counsel's performance was deficient and that his deficient performance prejudiced the defense. *Id.* at 687. Further, this showing must be made by a preponderance of the evidence. *Jackson v. State*, 672 S.W.2d 367, 368 (Mo. App. 1984).

3. Movant's initial allegation of ineffective assistance of counsel makes reference to an incident, wherein defense witnesses, James Edwards, Gladys Edwards and Laura Lee, were reportedly told by an unidentified person that they could leave the courthouse because their testimony was no longer required. If in fact, defense witnesses were so informed, Movant must allege fault on the part of defense attorney in connection with the witnesses' departure. *State v. Twenter*, 818 S.W.2d 628, 637 (Mo. banc 1991). The Movant, who

carries the burden of proof, has failed to show that counsel was in any way responsible for the witnesses' failure to appear and testify.

4. Movant further alleges that he was denied his right to due process of law and to a fair trial because the court erred in overruling defense counsel's motion for a continuance, thereby preventing Movant from locating his witnesses. Trial error is an issue properly raised on direct appeal. An issue which was or should have been raised on direct appeal is not cognizable in a post-conviction relief proceeding. *Stuckey v. State*, 756 S.W.2d 587, 590 (Mo. App. 1988). Even a trial error affecting a constitutional right cannot be litigated in a rule 29.15 motion "except in a rare and exceptional circumstance." *Id.*

5. Finally, Movant claims that he was denied effective assistance when defense counsel failed to object to the court's basis for denying Movant's request for a continuance. Decisions concerning whether or when to make objections at trial are left to the judgment of counsel. *State v. Suarez*, 867 S.W.2d 583, 587 (Mo. App. 1993); *State v. Brasher*, 867 S.W.2d 565, 570 (Mo. App. 1 993). A mere failure to object, by itself, does not amount to ineffective assistance of counsel. *State v. Shurn*, 866 S.W.2d 447, 471 (Mo banc 1993); *State v. Lewis*, 874 S.W.2d 405, 427 (Mo. App. 1993). The fact that a meritorious objection may not have been made does not demonstrate incompetence, rather there must be a showing that counsel's overall performance fell short of established norms and that this incompetence probably affected the result. *State v. Jones*, 885 S.W.2d 57, 58 (Mo. App. 1994); *Jones v. State*, 784 S.W.2d 789, 793 (Mo. banc 1990).

6. Movant's next allegation of ineffective assistance of counsel alleges that defense counsel failed to adequately consult with Movant about testifying on his own behalf. Defense counsel's advice to his client as to whether or not to testify is a matter of trial strategy. *State v. Kennedy*, 842

S.W.2d 937, 945 (Mo. App. 1992); State v. Gray, 812 S.W.2d 935, 940 (Mo. App. 1991). Allegations of ineffective assistance of counsel relating to matters of trial strategy do not provide a basis for post-conviction relief, for counsel is allowed wide latitude in conducting a defense and is entitled to use his best judgment. *Stuckey*, 756 S.W.2d at 593; *State v. Borders*, 844 S.W.2d 49, 54 (Mo. App. 1992).

7. Further, the record does not support Movant's contention that defense counsel failed to properly advise him of his right to testify. See Attached Exhibit A. On the contrary, defense counsel went into great detail in advising Movant about his right to testify. In light of the fact that defense counsel shall take into consideration movant's prior convictions in advising his client whether or not to testify, it would appear that counsel's recommendation to his client was well founded. *Burroughs v. State*, 590 S.W.2d 695, 697 (Mo. App. 1979).

8. Movant next alleges that defense counsel was ineffective in failing to object to the court's submission of the charge of murder in the first degree to the jury under Instruction Number 6. Movant argues that Instruction Number 6 fails to require the jury to find that Movant deliberated in aiding or encouraging Reginald Rhodes to cause the death of Steve Shelby. On the date of Movant's trial, February 22, 1994, Instruction Number 6, or MAI-CR3d 313.02 modified by 304.04, was the proper instruction. The instruction submitted at Movant's trial has been modified, however, the effective date of that modification was October 1, 1994, approximately eight months after Movant's trial. Therefore, any objection that defense counsel could have made, would have been meritless, and counsel is not required to make an objection that is without merit. *State v. Pagano*, 882 S.W.2d 326, 337 (Mo. App. 1994); *State v. Settle*, 670 S.W.2d 7, 13 (Mo. App. 1984).

9. Further, in determining whether counsel is ineffective in assisting his client on the law, the attorney's conduct is

measured by what the law is considered at the time of trial. Defense counsel will not be found ineffective for failing to anticipate changes in the law. *State v. Cunningham*, 863 S.W.2d 914, 921 (Mo. App. 1993); *Felton v. State*, 753 S.W.2d 34, 35 (Mo. App. 1988).

10. Finally, allegations of instructional error are beyond the scope of a motion for post-conviction relief and are proper matters for direct appeal. *State v. Shurn*, 866 S.W.2d 447, 468 (Mo. App. 1993); *Henderson v. State*, 789 S.W.2d 498, 502 (Mo. App. 1990); *Richardson v. State*, 773 S.W.2d 858, 860 (Mo. App. 1989); *Sempsrott v. State*, 784 S.W.2d 198, 201 (Mo. App. 1989).

11. Movant asserts that trial counsel was ineffective in failing to object, request a mistrial, or request a continuance in order to conduct further investigation of Steven Shelby's sister, Rhonda Shelby. The Missouri Supreme Court has stated that, "[o]nly rarely does a court find that failure to interview witnesses is sufficient to justify the finding of ineffective assistance of counsel." *Sanders v. State*, 738 S.W.2d 856, 858 (Mo. banc 1992). Counsel has a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. *Id; Evans v. State*, 759 S.W.2d 858, 859 (Mo. App. 1988). The reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant. *Strickland*, 466 U.S. at 691. When counsel knows generally the facts that support a potential defense, the need for further investigation may be considerably diminished or eliminated altogether. *Id.* In any ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment. *Id.* Movant has failed to show how defense counsel's "lack of investigation" has prejudiced him.

12. Movant's final allegation of ineffective assistance of counsel in his amended motion alleges that defense counsel was ineffective in failing to call Reginald Rhodes to testify. In order to support a claim of ineffectiveness, Movant must prove that his attorney's failure to call the witness was something other than trial strategy. *State v. Carson,* 898 S.W.2d 555, 557 (Mo. App. 1995). Allegations of ineffective assistance of counsel relating to matters of trial strategy do not provide basis for Post-conviction relief, for counsel is allowed wide latitude in conducting a defense and is entitled to use his best judgment. *State v. Williamson,* 877 S.W.2d 258, 262 (Mo. App. 1994). "If an attorney believes that the testimony of an alibi witness would not unqualifiedly support his client's position, it is a matter of trial strategy not to call him to the stand." *Eldzidge v. State,* 592 S.W.2d 738, 741 (Mo. banc. 1979). The selection of witnesses remains a question of trial strategy that is "virtually unchallengeable." *Harris,* 870 S.W.2d at 857; *State v. White,* 870 S.W.2d 869, 875 (Mo. App. 1993).

13. Further, Movant must identify who the witness is, what his testimony would have been, whether or not counsel was informed of his existence, and whether or not he was available to testify. *State v. Dudley,* 819 S.W.2d 51, 56 (Mo. App. 1991). Movant has failed to allege whether counsel was informed or had any knowledge of Reginald Rhodes willingness to testify on Movant's behalf. *State v. Simmons,* 875 S.W.2d 919, 923 (Mo. App. 1994); *Jones v. State,* 773 S.W.2d 156, 159 (Mo. App. 1989). Movant does allege that defense counsel was ineffective for not calling Reginald Rhodes as a witness. Movant concludes that Mr. Rhodes would have testified that Movant had no prior knowledge of the offense and was not a willing or knowing participant in the crime. Movant does not recite what Mr. Rhodes' testimony would have been, nor does he state a basis for his improbable conclusion that Mr. Rhodes was apparently able to read his mind to determine his intent, or lack thereof. *State*

v. Turner, 810 S.W.2d 92, 94 (Mo. App. 1991); *Mathenia v. State,* 752 S.W.2d 873, 876 (Mo. App. 1988).

PRO SE MOTION

14. In his pro se motion, Movant alleges trial counsel's ineffectiveness in failing to object to the giving of Instruction Number 4 at the trial of Movant's case. Movant submits that, in defining proof beyond a reasonable doubt as proof that leaves jurors "firmly convinced," the trial court diminished the meaning of reasonable, thereby violating Movant's right to due process of law as guaranteed by the state and federal constitutions. Missouri courts have continually held that this instruction meets with the constitutional requirement that the jury be instructed that a defendant be proven guilty beyond a reasonable doubt. *Shun,* 866 S.W.2d at 462; *State v. Ervin,* 835 S.W.2d *905,* 926 (Mo. banc 1992); *State v. Griffin,* 818 S.W.2d 278, 282 (Mo. banc 1991). This instruction merely explains the term "reasonable doubt" to the jury and does not equate proof beyond a reasonable doubt with a lesser standard. *Id.* Therefore, any objection that trial counsel could have made, would have been meritless, and defense counsel cannot be deemed ineffective for declining to make a non-meritorious objection. *State v. Pagano,* 882 S.W.2d at 337; *State v. Settle,* 670 S.W.2d at 13.

15. Further, objections to jury instructions are properly raised on direct appeal and are not cognizable in a post-conviction relief proceeding absent exceptional circumstances. *State v. Six,* 805 S.W.2d 159, 168 (Mo. App. 1991); *Roberts v. State,* 775 S.W.2d 92, 96 (Mo. Banc 1989). Movant cannot bring his allegation within the scope of Rule merely by alleging as a conclusion that it affected a constitutional right. *Stuckey,* 756 S.W.2d at 590.

16. Movant's second and final allegation set forth in his pro se motion alleges that he received ineffective assistance of counsel because defense counsel did not submit an alibi

instruction, nor did counsel move to modify the instructions to include MAI-CR.3d 308.04 (1987) or MAI-CR3d 308.06 (1987). Referring back to Movant's amended motion and it's initial allegation of ineffective assistance of counsel, defense witnesses, James Edwards, Gladys Edwards and Laura Lee, failed to appear and testify on Movant's behalf. Therefore, Movant's claim is without merit because there was no evidence of an alibi adduced at trial.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that for the reasons set forth in the attached Findings of Facts and Conclusions of Law, the Court finds Movant's Pro Se and Amended Applications for Post-conviction Relief pursuant to Missouri Supreme Court Rule 29. 15 should be, and are hereby, overruled and dismissed with prejudice.

The Court further finds that an evidentiary hearing is not indicated; that a ruling can be and therefore is made solely from the transcript and pleadings on file and available to the Court.

/s/ Thomas C. Clark
Thomas C. Clark; Judge

Copies of the foregoing were mailed of this 21st day of August, 1995, to:

Linda Koch, Assistant Prosecuting Attorney
Susan Hogan, Assistant Appellate Defender
Pat Higley, Director of Criminal Records Court of Appeals—Western District of Missouri
Sharon Snyder, Clerk of Division 3.

[Filed Aug. 23, 1995] [SEAL]

Exhibit A

Q. All right.

So we don't want to use—you don't want to use the sister in Texas or the girlfriend up here; is that correct?

A. Yes, sir.

Q. All right.

Now, we discussed, did we not, that you have a right to testify and a right not to testify at this trial, didn't we?

A. Yes, sir.

Q. I want to cover a few moments on that, although after the State rests this case we'll take it up again. We discussed it, and I told you all the advantages and disadvantages of testifying, didn't I?

A. Yes, sir.

Q. I told you the advantage was the jurors generally like to hear a guy say, "I didn't do it."

You understand that?

A. Yes.

Q. I told you the disadvantages are if you testified, the State could then get in all your previous convictions; isn't that true?

You understand that?

A. Yes, sir.

Q. And we went over those, I believe you just had assault and armed criminal action, just got 80 years on, and then you had voluntarily manslaughter and you had receiving stolen property; isn't that true?

A. Yes, sir.

Q. And you may have had another one or two, but the jury won't know about those if you don't testify.

You understand that?

A. Yes, sir.

Q. They can't say anything about that. If they did, it's instant error or mistrial.

You understand that?

A. Yes, sir.

Q. You and I discussed it and you told me, did you not, that as of today you don't want to testify in the case.

You understand that?

A. Yes, sir.

Q. Now, did you make that decision on your own?

A. Yes, sir.

Q. Did I threaten you or promise you—or did anyone else threaten you or promise you anything to get you to testify or not testify?

A. No, sir.

Q. You understand whether you testify or not can finally be made after they rest their case before we started ours?

A. Yes, sir.

Q. And you and you alone decide that, not me or anybody else.

You understand that?

A. Yes, sir.

Q. Now, there was a motion in here by your previous lawyer Mr. Calbi—C-a-l-b-i—

A. Yes, sir.

Q.—Robert Calbi; isn't that true?

A. Yes, sir.

Q. Mr. Calbi represented you on that assault case where you were sentenced to 80 years by Judge Ely—E-l-y—isn't that right?

A. Yes, sir.

Q. And then he and his investigator did some investigation in this case, and he realized he was probably going to have to be a witness in it, and he withdrew; isn't that true?

A. Yes, sir.

Q. And he gave me all the discovery that he had, you understand that?

* * * *

Q. All I can do is proceed without them and do the best I can.

Do you understand?

A. Yes, sir.

Q. Is there anything you think you ought to do or want me to do or that I refused to do to try to get them back here during—for this trial?

A. Well, I would like to know if we can get a couple hours' continuance and try to locate them, because it's very valuable to my case.

Q. All right.

I'll ask the Court for that at the proper time.

I suppose we could ask for a capias, and—but if they're from California I don't know.

Anyway—

A. I know in fact they didn't go back to California, sir. I know that.

Q. How do you know that?

A. Because they have some ministering—my stepfather's a minister—to do here tonight and tomorrow night.

Q. Well, getting back—we'll cover that later.

Getting back to this, you still—you understand your rights. You still have a right to testify and a right not to testify?

A. Yes, sir.

Q. And one of the reasons that I recommend you not testify is you were found guilty on an assault case with armed criminal action a month or two ago in a separate case in Jackson County, weren't you?

A. Yes, sir.

Q. And Judge Ely give you 50 years and 8 years to run consecutive on those two, didn't he?

A. Yes, sir.

MS. KOCH-CARROLL: No, 50 and 30.

Q. [BY MR. McMULLIN:] Okay. Fifty and thirty to make it a total of eighty years?

A. Yes, sir.

Q. And you have several other felony convictions; isn't that true?

A. Yes, sir.

Q. And you understand—I told you if you get on the stand and testify, they could get—they can introduce those to the jury. But if you don't testify, this jury won't know about it.

You understand that?

A. Yes, sir.

Q. And the judge has given an instruction or approved an instruction he going to give, he's indicated, that says the fact that you do not testify cannot be used as evidence against you.

You understand that?

A. Yes, sir.

Q. So do you want to testify or not testify?

A. No, sir.

Q. Again, out of an abundance of caution, do you understand, sir, that if you're convicted tomorrow or next year or the year after, and you try to come back and say, "Well, hey, I wanted to testify and McMullin wouldn't let me or somebody threatened me or they lied to me," you're not going to get anywhere.

You understand that?

A. Yes, sir.

Q. All right.

MR. McMULLIN: Your Honor, I have no further questions of this witness.

THE COURT: All right.

I think you've made a good record with respect to his rights and his right to testify or not. And you've made—well, do you intend to file a motion for a continance?

MR. McMULLIN: He's asked for one,

* * * *

WD #49456

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

v.

REMON M. LEE,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit

The Honorable Anthony P. Nugent, Senior Judge (Trial)
The Honorable Thomas C. Clark, Judge of
Division 3 (PCR)

Remon Lee v. Mike Kemna
No. 980074-CV-W-8-P
Respondent's Exhibit 7

APPELLANT'S BRIEF

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INDEX

	Page
Jurisdictional Statement	1
Statement of Facts	2
Point I	7
Point II	9
Argument I	11
Argument II	18
Conclusion	25

JURISDICTIONAL STATEMENT

This is a consolidated appeal pursuant to Rule 29. 15(1)[1]. Appellant, Remon Lee, was convicted after a trial by jury in the Circuit Court of Jackson County of one count each of murder in the first degree, Section 565.020, RSMo 1994, and armed criminal action, Section 571.015, RSMo 1994. The Honorable Anthony P. Nugent, Senior Judge, sentenced Appellant to concurrent terms of life imprisonment without parole on the count of murder in the first degree and ten years imprisonment on the count of armed criminal action. Appellant also appeals the denial, without an evidentiary hearing, of his Rule 29.15 motion for postconviction relief by the Honorable Thomas C. Clark, Judge of Division 3.

This appeal does not involve any matters reserved for the exclusive jurisdiction of the Missouri Supreme Court, therefore, jurisdiction over this cause lies with the Missouri Court of Appeals, Western District. Mo. Const., Article V, Section 3 (as amended 1982); Section 477.070, RSMo 1994.

STATEMENT OF FACTS

Appellant, Remon Lee, was charged by information in lieu of indictment filed in the Circuit Court of Jackson County with one count of murder in the first degree, Section 565.020, RSMo 1994, and one count of armed criminal action, Section 571.015. RSMo 1994 (L.F. 5-6). The case was tried before a jury beginning on. February 22, 1994 (L.F. 41; Tr. 2). Evidence adduced at trial favorable to the verdict was as follows.

On the afternoon of August 27, 1992, Reginald Williams, then age 18, and his friend, William Sanders, then age 15, were trying to start a moped in a yard between 67th Street and 68th Street on Monroe in Kansas City (Tr. 205-206, 260, 384-385, 391, 397). While they were there, an older model rusty

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[1]Missouri Rules of Court, 1995 edition.

orange or red and white truck drove up the street, headed south on Monroe (Tr. 207, 209, 386). The driver was the only person in the truck (Tr. 211-212).

The truck pulled into a driveway and turned around (Tr. 208-209, 210, 386). The truck drove very slowly back down the street, headed north (Tr. 212, 268-269, 386-387, 388). As the truck headed north, it passed Williams and Sanders again (Tr. 212). The driver stared at Sanders and Williams for about ten seconds while they tried to start the moped (Tr. 212-213, 386, 398-400).

The truck parked in front of a tan Cadillac on Monroe and stayed there for about 30 minutes (Tr. 213, 388, 400). Eventually a blue 1965 Chevy Nova came around the corner, carrying a driver and one passenger (Tr. 215-216, 378, 389). The car stopped directly across from the truck and the passenger jumped out and went around to the front of the car (Tr. 214-215, 390, 400-401). The passenger fired six or seven shots into the driver's side of the blue car and then ran behind the red truck and jumped in the passenger side of the truck (Tr. 215, 217-218, 390, 401). After the passenger got in, the truck sped off, leaving tire tracks in the street (Tr. 220, 390, 401).

Steve Shelby, the driver of the Nova, died of penetrating injuries to the brain caused by gunshot wounds (Tr. 378, 436-437). Shelby sustained a total of nine gunshot wounds, including two on the top of his left shoulder and seven to the left side of his head and neck (Tr. 437). Two slugs were recovered from Shelby's left shoulder (Tr. 437). Gunpowder stippling very finely distributed over the left side of Shelby's head indicated the wounds were inflicted at close range (Tr. 437, 438-439). Seven bullets and nine shell casings recovered from the scene were all fired from the same .9 millimeter caliber semiautomatic weapon (Tr. 199-200, 438). No gun was ever recovered (Tr. 383).

Later that day, Williams picked Appellant's photograph out of a photographic lineup and identified him as looking like the driver of the truck (Tr. 226-227, 355-356). Williams later identified Appellant as the driver after viewing two videotaped lineups (Tr. 208-209, 229-232, 365-366, 369-372). Williams could not identify anyone as the shooter (Tr. 356, 372-374).

William Sanders also viewed a photographic lineup on August 27, 1992, and identified Reginald Rhodes as the shooter (Tr. 357, 393-394, 411). Prior to trial, Sanders made no identification of Appellant or anyone else as the driver of the truck (Tr. 359), however, at trial Sanders claimed he could identify Appellant as the driver (Tr. 414-415).

Shelby's sister, Rhonda Shelby, saw Appellant and Reginald Rhodes together near a red truck behind her duplex at 6621 Askew in Kansas City around 8:00 p.m. on August 26, 1992 (Tr. 443-445, 452-453, 455-456). Rhodes's aunt was one of Rhonda Shelby's neighbors (Tr. 455). Later that night, Reginald Rhodes asked Rhonda about her brother (Tr. 445).

Lynne Bryant lived at 6623 Askew on August 26, 1992 (Tr. 471). Bryant saw Appellant and Rhodes outside her duplex that evening; Appellant had an old orange truck and Rhodes asked Bryant if she had seen Steve Shelby (Tr. 472-473, 478).

Appellant's prior counsel, Robert Calbi, and Fred Macon, an investigator who worked with Calbi, testified on Appellant's behalf that Reginald Williams gave Calbi a statement on April 23, 1993, in which Williams claimed he could not see the driver of the car well enough to identify him (Tr. 503-505, 510-514, 519-520, 525, 547-566). Following Calbi's testimony, the court adjourned for the lunch recess (Tr. 570-571).

When the proceedings returned to the record following the noon recess on February 24, 1994, defense counsel put

Appellant on the witness stand to make a record regarding Appellant's right to testify (Tr. 572-573). In the course of the questioning, counsel developed the fact that Appellant's mother, Gladys Edwards, stepfather, James Edwards, and sister, Laura Lee, had come from California to testify for Appellant (Tr. 573-574). Defense counsel had met with these witnesses on February 21, 1994, and had served each of them with a subpoena (Tr. 574, 576, 580-581). Ms. Lee and Mr. and Mrs. Edwards were at the courthouse from 8:30 until about 11:00 a.m. on February 24, 1994 (Tr. 574-576). By the afternoon session, Ms. Lee and Mr. and Mrs. Edwards were gone and could not be found (Tr. 575-577). Appellant and counsel did not know why they had left (Tr. 576). Although defense counsel claimed, "[T]here's nothing I can do if they're not here" (Tr. 576), Appellant asked counsel to request a continuance for "a couple hours" to try to locate his witnesses (Tr. 577). Appellant told counsel he knew his parents had not returned to California because they had a religious activity planned that evening in Kansas City (Tr. 577).

Defense counsel moved for a continuance at Appellant's request (Tr. 579-580). Although the alibi witnesses were Appellant's sister, mother, and stepfather who had come from California voluntarily to testify for Appellant, the trial court overruled the continuance motion (Tr. 573-575, 580, 584). In overruling the motion, the court assumed Appellant's family members had abandoned him (Tr. 582-584). In response to defense counsel's request to adjourn until the next morning, the court stated, "[M]y daughter is going to be in the hospital all day. . . . So I've got to stay with her. . . . it's too bad. The Court will not be able to be here tomorrow to try the case." (Tr. 580, 583). Appellant called no further witnesses (Tr. 590).

The trial court overruled Appellant's motions for judgment of acquittal at the close of the state's evidence and at the close

of all the evidence (L.F. 43-44, 45-46; Tr. 489, 490-491, 591). The jury found Appellant guilty of murder in the first degree and armed criminal action (L.F. 34, 36; Tr. 626-627). On April 19, 1994, the Honorable Anthony P. Nugent, Senior Judge, sentenced Appellant to concurrent terms of life imprisonment without parole on the count of murder in the first degree and thirty years imprisonment on the count of armed criminal action (L. F. 58; Sent. Tr. 1 , 2, 8).

On November 21, 1994, Appellant timely filed a *pro se* motion for postconviction relief pursuant to Rule 29.15 (PCR L.F. 1-2, 3-14). This motion was amended by appointed postconviction counsel, who also requested an evidentiary hearing (PCR L.F. 15, 16, 17-18, 19, 20-30, 31). Appellant's motions alleged, *inter alia* that Appellant received ineffective assistance of trial counsel 1) when trial counsel failed to call Appellant's codefendant Reginald Rhodes to testify on Appellant's behalf at trial, and 2) when the trial court overruled Appellant's motion for continuance after Appellant's alibi witnesses mysteriously disappeared from the courthouse before they could be called to testify (PCR L.F. 21-25, 27-28). On August 21, 1995, the Honorable Thomas C. Clark, Judge of Division 3, issued findings of fact and conclusions of law overruling Appellant's motion without granting an evidentiary hearing (PCR L.F. 32-46). Appellant filed a timely notice of appeal on October 2, 1995 (PCR L.F. 48), and this appeal follows.

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR CONTINUANCE FROM THE AFTERNOON OF FEBRUARY 24, 1994, UNTIL THE NEXT MORNING, AFTER APPELLANT'S SUBPOENAED ALIBI WITNESSES MYSTERIOUSLY DISAPPEARED FROM THE COURTHOUSE BEFORE TESTIFYING, BECAUSE THE DENIAL OF THE CONTINUANCE VIOLATED

APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO PRESENT WITNESSES IN HIS DEFENSE, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT THE TESTIMONY OF THE MISSING ALIBI WITNESSES WAS VITAL, MATERIAL, AND RELEVANT TO APPELLANT'S DEFENSE, THE CONTINUANCE REQUESTED BY COUNSEL WAS REASONABLE UNDER THE CIRCUMSTANCES, AND THE TRIAL COURT'S REASONS FOR DENYING THE CONTINUANCE HAD NOTHING TO DO WITH THE CASE ITSELF, BUT RATHER WITH THE COURT'S PERSONAL SCHEDULE.

State v. Fuller, 837 S.W.2d 304 (Mo. App. 1992);

State v. Lachterman, 812 S.W.2d 759 (Mo. App. 1991);

State v. Reece, *505* S.W.2d 50 (Mo. 1974);

State v. Davis, 625 S.W.2d 903 (Mo. App. 1981);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Sections 10 and 18(a); and

Missouri Supreme Court Rule 24.10.

POINT II

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S RULE 29.15 MOTION FOR POSTCONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING, BECAUSE THE RECORD LEAVES THE FIRM CONVICTION THAT A MISTAKE HAS BEEN MADE, IN THAT APPELLANT HAS ALLEGED FACTS, NOT CONCLUSIONS, WHICH IF TRUE WOULD ENTITLE HIM TO RELIEF, AND WHICH

ARE NOT REFUTED BY THE RECORD, IN THAT APPELLANT HAS ALLEGED THAT TRIAL COUNSEL FAILED TO EXERCISE THE CUSTOMARY SKILL AND DILIGENCE A REASONABLY COMPETENT ATTORNEY WOULD EXERCISE UNDER THE SAME OR SIMILAR CIRCUMSTANCES, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, WHEN TRIAL COUNSEL 1) FAILED TO CALL APPELLANT'S CODEFENDANT REGINALD RHODES TO TESTIFY ON APPELLANT'S BEHALF THAT APPELLANT WAS NOT INVOLVED IN THE SHOOTING DEATH OF STEVE SHELBY, AND 2) THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S MOTION FOR CONTINUANCE AFTER APPELLANT'S ALIBI WITNESSES MYSTERIOUSLY DISAPPEARED FROM THE COURTHOUSE AFTER SOME UNKNOWN PERSON TOLD THEM THEIR TESTIMONY WAS NOT NEEDED.

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 752, 9 L.Ed.2d 799 (1963);
Powell v. Alabama, 287 U.S. *45*, 53 S.Ct. 55, 77 L.Ed. 158 (1932);
Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972);
Thomas v. State, 516 S.W.2d 761 (Mo. App. 1974);
Eldridge v. Atkins, *665* F.2d 228 (8th Cir. 1981), *denied*, 456 U.S. 910 (1982);
Owens v. State, 596 S.W.2d 480 (Mo. App. 1981);
Henderson v. Sergeant, 926 F.2d 706 (8th Cir. 1991);
Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990);
Porter v. State, 596 S.W.2d 706 (Mo. App. 1982);
State v. Vinson, 800 S.W.2d 444 (Mo. banc 1990);
Perkins-Bey v. State, 735 S.W.2d 170 (Mo. App. 1987);
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
Seales v. State, 580 S.W.2d 733 (Mo. banc 1979);
Love v. State, 670 S.W.2d 499 (Mo. banc 1984);
State v. Schaal, 806 S.W.2d 659 (Mo. banc 1991);
State v. Carey, 808 S.W.2d 861 (Mo. App. 1991);
State v. Watson, 806 S.W.2d 677 (Mo. App. 1991);
U.S. Const., Amends. VI and XIV;
Mo. Const., Article I, Sections 10 and 18(a); and
Missouri Supreme Court Rule 29.15.

ARGUMENT I

THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR CONTINUANCE FROM THE AFTERNOON OF FEBRUARY 24, 1994, UNTIL THE NEXT MORNING, AFTER APPELLANT'S SUBPOENAED ALIBI WITNESSES MYSTERIOUSLY DISAPPEARED FROM THE COURTHOUSE BEFORE TESTIFYING, BECAUSE THE DENIAL OF THE CONTINUANCE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO PRESENT WITNESSES IN HIS DEFENSE, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT THE TESTIMONY OF THE MISSING ALIBI WITNESSES WAS VITAL, MATERIAL, AND RELEVANT TO APPELLANT'S DEFENSE, THE CONTINUANCE REQUESTED BY COUNSEL WAS REASONABLE UNDER THE CIRCUMSTANCES, AND THE TRIAL COURT'S REASONS FOR DENYING THE CONTINUANCE HAD NOTHING TO DO WITH THE CASE ITSELF, BUT RATHER WITH THE COURT'S PERSONAL SCHEDULE.

The trial court abused its discretion in overruling Appellant's motion for a continuance to obtain the trial testimony of Gladys Edwards, James Edwards, and Laura Lee. The testimony of Laura Lee and of Mr. and Mrs. Edwards was vital, material, and relevant to the merits of Appellant's case, and the denial of the continuance to seek their testimony prejudiced Appellant. The witnesses had been subpoenaed by defense counsel and were present in the courthouse during the morning of the third day of trial. When their turn came to testify that afternoon, the witnesses were no longer in the courthouse and could not be located. Appellant had expected

Ms. Lee and Mr. and Mrs. Edwards to provide him with an alibi. The trial court's denial of the requested continuance denied Appellant's state and federal constitutional rights to due process of law and to present witnesses in his defense.

Defense counsel served subpoenas on potential defense witnesses Laura Lee and Gladys and James Edwards on Monday, February 21, 1994, prior to the start of trial (Tr. 573-575, 576, 580-581). Ms. Lee is Appellant's sister and Mr. and Mrs. Edwards are his mother and stepfather (Tr. 573-574). All three live in Ventura, California, and came to Kansas City, Missouri voluntarily to testify on Appellant's behalf (Tr. 195-197, 573-575, 580). During opening statement, defense counsel told the jury he expected Ms. Lee and Mr. and Mrs. Edwards to testify that Appellant visited them in Ventura, California from mid-July, 1992, until late October, 1992 (Tr. 195-197). Following the close of the state's case, defense counsel called Robert Calbi and Fred Macon to testify regarding a statement given to Calbi by state's witness Reginald Williams (Tr. 503-505, 510-514, 519-520, 525, 547-566). Following Calbi's testimony, the court declared a luncheon recess (Tr. 570-571).

When court reconvened for the afternoon, defense counsel made a record that Ms. Lee and Mr. and Mrs. Edwards had been in the courthouse earlier in the day and had mysteriously disappeared (Tr. 572-584). At Appellant's urging, counsel requested a continuance until the next morning, so that the witnesses could be located and called to testify (Tr. 576-577, 579-580). The court assumed Appellant's family had abandoned him after coming all the way from California to testify on his behalf (Tr. 573-575, 580, 582-584). When counsel requested that the cause be adjourned for the day and the jury directed to return in the morning, the court stated, "[M]y daughter is going to be in the hospital all day. . . . So I've got to stay with her. . . . it's too bad. The Court will not be able to be here tomorrow to try the case. " (Tr. 580, 583).

The Court also informed the parties he had another trial starting the following Monday, so the case could not be continued until then (Tr. 583).

The court overruled the motion for continuance and the case was submitted to the jury without the alibi testimony of Laura Lee and Gladys and James Edwards (Tr. 590). During closing argument, defense counsel apologized for the absence of alibi testimony (Tr. 619). The state argued Appellant "no doubt" was in town on August 26 and 27, 1992, based on the lack of alibi testimony (Tr. 624). The jury upon its deliberations found Appellant guilty of murder in the first degree and armed criminal action (L.F. 34, 36; Tr. 626-627).

A ruling on a motion for a continuance is a matter resting in the discretion of the trial court, and such a decision will not be reversed absent a strong showing of abuse. *State v. Fuller*, 837 S.W.2d 304, 307 (Mo. App. 1992). The party requesting the continuance bears the burden of showing both an abuse of discretion and prejudice stemming from the denial of the continuance. *Id.* When the request for a continuance is based upon the absence of a witness, the trial court may consider the probability of whether the witness will be found. *Id.*, citing *State v. Lachterman*, 812 S.W.2d 759, 763 (Mo. App. 1991). The trial court will not be found to have abused its discretion if the continuance probably would not have resulted in the presence of the witness at trial. *Fuller*, 837 S.W.2d at 307. To warrant reversal on appeal, the appellant must show that it is reasonably probable that the witness's testimony would change the outcome of the trial. *Id.*, citing *State v. Reece*, 505 S.W.2d 50, 52 (Mo. 1974); *State v. Davis*, 625 S.W.2d 903, 905 (Mo. App. 1981).

The trial court clearly abused its discretion in overruling Appellant's motion for a continuance to locate Laura Lee and James and Gladys Edwards. Each of these witnesses were essential to Appellant's defense, because they would have provided Appellant with a defense of alibi. Defense counsel

informed the jury that the Edwards and Ms. Lee would testify that Appellant was in Ventura, California on August 27, 1992 (Tr. 195-197). Evidence that Appellant was not even in Kansas City at the time of the shooting was material to Appellant's defense, because the identification testimony of Reginald Williams and William Sanders was weak. Although Reginald Williams originally identified Appellant as the driver of the truck, Williams later cast doubt on that identification in an interview with Appellant's first attorney, Robert Calbi (Tr. 208-209, 226-232, 355-356, 365-366, 369-372, 503-505, 510-514, 519-520, 525, 547-566). Although William Sanders claimed at trial that he could identify Appellant as the driver of the truck, Sanders had never identified Appellant or anyone else as the driver prior to trial (Tr. 359, 414-415). Because the identification testimony of Williams and Sanders was weak, any evidence defense counsel could present that Appellant was not even in town at the time of the shooting would have had a significant impact on the jury's deliberations and very well could have resulted in Appellant's acquittal.

The record clearly reflects trial counsel's diligence in locating and bringing in Laura Lee and Mr. and Mrs. Edwards to obtain their testimony for Appellant's trial. All three potential witnesses came voluntarily to Kansas City from their homes in California (Tr. 573-575, 580). Even though the witnesses came to Kansas City voluntarily, defense counsel had them come to his office so he could serve them with subpoenas directing them to appear to testify on February 24, 1994 (Tr. 574, 576, 580-581). Ms. Lee and Mr. and Mrs. Edwards came to the courthouse as directed and were present in the courthouse on the morning of February 24, 1994, although they could not be found that afternoon (Tr. 574-576).

Despite the absence of the witnesses at the time counsel wanted to call them to testify, a reasonable probability existed

that the witnesses could have been found had the court granted a short continuance for the purpose of locating the witnesses. All three witnesses had been served with subpoenas and they were in the State of Missouri voluntarily for the express purpose of testifying on Appellant's behalf (Tr. 573-575, 580). The fact that they had disappeared from the courthouse came as a surprise to both defense counsel and Appellant (Tr. 576). Appellant informed the court that he knew they still had to be in town because they had a religious function to attend that night (Tr. 577). Ms. Lee and Mr. and Mrs. Edwards were staying with relatives (Tr. 573-575), and Appellant's girlfriend had been trying to find them when the court overruled the motion for continuance (Tr. 576). The probability of actually locating Ms. Lee and Mr. and Mrs. Edwards and getting them into the courtroom weighed heavily in Appellant's favor. The trial court ignored the circumstances under which the witnesses came to Kansas City in overruling the continuance motion. The court simply assumed, without conducting further investigation or affording counsel the opportunity to do so, that Appellant was abandoned by his own family members just two or three hours before they were expected to testify on Appellant's behalf (Tr. 582-584).

Appellant was clearly prejudiced by the court overruling his motion for continuance. In the absence of his alibi witnesses, Appellant was forced to close his evidence without presenting the affirmative defense evidence of alibi that his trial attorney had promised the jury in opening statement (Tr. 195-197, 590). Appellant was forced to decide again whether or not to testify on his own behalf (Tr. 572-579). Appellant chose not to testify, which prevented his prior convictions from being placed before the jury, but which kept the jury from hearing that Appellant was in Ventura, California on August 27, 1992, the date Steve Shelby was shot.

Particularly troubling about the trial court's decision to overrule the motion for continuance is the reason for the court's ruling. The trial court informed the parties that the case could not be continued because the trial judge's daughter was to be hospitalized all day the next day, and "it's too bad. The Court will not be able to be here tomorrow to try the case" (Tr. 580, 583). With all respect and sympathy for the trial court's predicament as a parent, the fact remains that Appellant was on trial for murder in the first degree, facing life imprisonment without possibility of probation or parole, and his witnesses unexpectedly and inexplicably disappeared just shortly before they were to testify on his behalf. There was no indication of malfeasance or misfeasance on the part of Appellant or his witnesses. The trial court made no effort to resolve the matter by giving defense counsel even a short time to attempt to locate the witnesses, nor did he attempt to find another judge to preside over the remainder of Appellant' trial if it should carry over to the next day. Despite the trial court's understandable concerns as a parent, Appellant had equally very compelling concerns about having a fair trial, presenting witnesses in his defense, and having his liberty interests adequately protected. The trial court at the very least should have granted a continuance of a few hours, instead of simply overruling the continuance motion and forcing Appellant to close his case without presenting the very heart of his defense. The trial court certainly abused its discretion when it overruled Appellant's motion for continuance on the basis of the court's scheduling concerns, which were entirely unrelated to Appellant's case.

The trial court abused its discretion and Appellant truly was prejudiced when the court overruled Appellant's motion for a continuance. Appellant therefore respectfully requests that this Court reverse his convictions and sentences and remand this cause for a new trial.

ARGUMENT II

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S RULE 29.15 MOTION FOR POSTCONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING, BECAUSE THE RECORD LEAVES THE FIRM CONVICTION THAT A MISTAKE HAS BEEN MADE, IN THAT APPELLANT HAS ALLEGED FACTS, NOT CONCLUSIONS, WHICH IF TRUE WOULD ENTITLE HIM TO RELIEF, AND WHICH ARE NOT REFUTED BY THE RECORD, IN THAT APPELLANT HAS ALLEGED THAT TRIAL COUNSEL FAILED TO EXERCISE THE CUSTOMARY SKILL AND DILIGENCE A REASONABLY COMPETENT ATTORNEY WOULD EXERCISE UNDER THE SAME OR SIMILAR CIRCUMSTANCES, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, WHEN TRIAL COUNSEL 1) FAILED TO CALL APPELLANT'S CODEFENDANT REGINALD RHODES TO TESTIFY ON APPELLANT'S BEHALF THAT APPELLANT WAS NOT INVOLVED IN THE SHOOTING DEATH OF STEVE SHELBY, AND 2) THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S MOTION FOR CONTINUANCE AFTER APPELLANT'S ALIBI WITNESSES MYSTERIOUSLY DISAPPEARED FROM THE COURTHOUSE AFTER SOME UNKNOWN PERSON TOLD THEM THEIR TESTIMONY WAS NOT NEEDED.

The motion court clearly erred in denying Appellant's Rule 29.15 motion for postconviction relief without granting an evidentiary hearing, because Appellant has alleged sufficient facts, not conclusions, which are not refuted by the record and

which if proven to be true would entitle him to relief. Appellant has asserted that trial counsel did not act as a reasonably competent attorney in his representation of Appellant when he failed to call Appellant's codefendant Reginald Rhodes to testify on Appellant's behalf. Appellant has also alleged that trial counsel was rendered ineffective by the trial court's ruling on defense counsel's motion for continuance, after Appellant's alibi witnesses mysteriously disappeared from the courthouse shortly before being called to testify on Appellant's behalf.

Appellate review of a hearing court's decision in a Rule 29.15 proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(j). A hearing court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. *State v. Schaal*, 806 S.W.2d 659, 667 (Mo. banc 1991). A postconviction movant is entitled to an evidentiary hearing if one is requested and if 1) he alleges facts which would warrant relief if found to be true; 2) the allegations are not refuted by the record; and 3) the movant was prejudiced by the errors. *State v. Carey*, 808 S.W.2d 861, 867 (Mo. App. 1991); *State v. Watson*, 806 S.W.2d 677, 680 (Mo. App. 1991); Rule 29.15(g).

The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 752, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). In order to have his conviction set aside, Appellant must show that trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the

existing circumstances, and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Seales v. State*, 580 S.W.2d 733, 736-737 (Mo. banc 1979). In order to show prejudice, Appellant must demonstrate that counsel's omissions had a material effect, deleterious to him, on the outcome of the trial. *Love v. State*, 670 S.W.2d 499, 503 (Mo. banc 1984).

Appellant has alleged facts, not conclusions, which 1) would warrant relief, 2) are not refuted by the record, and 3) have caused him prejudice. Appellant is therefore entitled to an evidentiary hearing on his Rule 29. 15 motion.

The record reflects that Reginald Rhodes pleaded guilty to the shooting death of Steve Shelby prior to the date of Appellant's trial (Sent. Tr. 14-15). Appellant alleged at his sentencing hearing and in his motions for postconviction relief that he wanted Rhodes to testify on his behalf at trial and that he told defense counsel that Rhodes was willing to testify for him (PCR L.F. 27-28; Sent. Tr. 10-11. 13-16). Appellant told the court at sentencing that he had spoken with Rhodes' and Rhodes was willing to testify that Appellant had nothing to do with the shooting of Shelby (Sent. Tr. 13-15). Defense counsel told Appellant he did not believe Appellant had told him Rhodes was willing to testify, but allowed that he might be wrong, stating, "I'll check my file again" (Sent. Tr. 14-15).

Included in a defendant's right to the effective assistance of counsel is the right to a thorough investigation of his case by his attorney. *Thomas v. State*, 516 S.W.2d 761, 764 (Mo. App. 1974); *Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982). The duty of defense counsel includes contacting potential witnesses named by the defendant who might aid the defense. *Thomas*, 516 S.W.2d at 765; *Owens v. State*, 596 S.W.2d 480, 482 (Mo. App. 1981) [Defense counsel's failure to interview and call witnesses

who would have established a defense, if proved, entitles movant to relief].

"The decision to interview a witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial." *Henderson v. Sergeant*, 926 F.2d 706, 711 (8th Cir. 1991), *citing*, *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990). Whether defense counsel's efforts are reasonable depends on the facts in each case. *Porter v. State*, 596 S.W.2d 706 (Mo. App. 1982). To establish counsel was ineffective for failing to call a witness, a movant must prove that the witness could have been located thorough reasonable investigation, would have testified if called, and would have provided the movant with a viable defense. *State v. Vinson*, 800 S.W.2d 444, 448 (Mo. banc 1990).

In *Perkins-Bey v. State*, 735 S.W.2d 170, 172 (Mo. App. 1987), the movant's convictions were reversed and a new trial was ordered because defense counsel did not take all reasonable steps to investigate and present favorable evidence. Defense counsel was found ineffective for failing to thoroughly investigate and subpoena an alibi witness, even though it was established that the witness was contacted by defense counsel and defense counsel's investigator. *Id.* The appellate court concluded the movant had established he was prejudiced by defense counsel's inaction. *Id.* "The presence of the alibi witness may not have changed the result, but the probability cannot be ignored and meets the minimum standard of undermining confidence in the outcome." *Id.*

In this case, defense counsel did not investigate the possibility that Reginald Rhodes might be willing to testify on Appellant's behalf. Rhodes had already pleaded guilty to the shooting death of Steve Shelby, and hence had little, if anything, to lose by testifying that Appellant was not involved in the shooting (Sent. Tr. 14-16). Defense counsel claimed at sentencing that he did not remember Appellant

mentioning Rhodes as a possible witness, but that he surely would have told Appellant the jury would not believe Rhodes even if he were willing to testify (Sent. Tr. 13-17). The motion court found this "decision" to be a matter of trial strategy (PCR L.F. 38). Appellant notes, however, that counsel made his assumption without even investigating the possibility that Rhodes would be willing to testify, and without even talking to Rhodes to make an informed decision about Rhodes's credibility if he were to testify (Tr. 13-17). The motion court's findings are clearly in error, as one logically cannot make a trial strategy decision in the absence of appropriate investigation. As in *Perkins-Bey*, the probability that Rhodes's testimony might have changed the result of the trial cannot be ignored and meets the minimum standard of undermining confidence in the outcome of Appellant's trial.

Appellant is also entitled to an evidentiary hearing on his claims relating to the trial court overruling his motion for continuance after Appellant's alibi witnesses mysteriously disappeared from the courthouse (PCR L.F. 21-25). Defense counsel made a lengthy record at time of trial regarding what had happened, based on the scant information then available (Tr. 572-584). At that time, all that was known was that the witnesses, who were under subpoena, had been present at the courthouse on the morning of February 24, 1994, and that they left the courthouse sometime after 11:00 a.m. (Tr. 573-580). As more fully developed in Point I, Appellant was forced to rest his case without presenting his evidence of alibi, after the trial court overruled defense counsel's motion for continuance (Tr. 582-584, 590).

Appellant has alleged that the mysterious disappearance of his witnesses and the trial court's ruling on the continuance motion have violated his right to the effective assistance of counsel (PCR L.F. 21-25). Appellant has alleged that since his trial he has learned that an unknown person, believed to

have been employed by the Jackson County Prosecutor's Office, told Appellant's alibi witnesses that they could leave the courthouse because their testimony was not needed (Tr. 21-25). Appellant has alleged that Laura Lee and Gladys and James Edwards left the courthouse and went to the home of a relative to await news of the verdict, not knowing that Appellant still needed them present to testify (PCR L.F. 21-25).

In denying a hearing on this claim, the motion court held that Appellant has failed to show that counsel was in any way responsible for the witnesses's failure to appear and testify (PCR L.F. 34). This finding is clearly erroneous and fails to appreciate the full extent of Appellant's claim. Although defense counsel did investigate Laura Lee and Gladys and James Edwards and made efforts to obtain their alibi testimony for Appellant, defense counsel's efforts were thwarted when Appellant's witnesses disappeared and when the trial court refused to allow counsel even a minimal amount of time to attempt to locate them. Regardless of counsel's earlier efforts, counsel cannot be deemed effective in his representation when people or forces outside the attorney-client relationship interfere with counsel's presentation of evidence in his client's behalf. The probability cannot be ignored in this case that the presence of the alibi witnesses may have changed the result of Appellant's trial. Appellant has at the very least met the minimum standard of undermining confidence in the outcome of his trial, and should have been granted an evidentiary hearing on this issue.

Appellant has been denied his constitutional rights to the effective assistance of counsel and to due process of law, and has been prejudiced thereby. Appellant therefore respectfully requests that this Court reverse the judgment of the hearing court and remand this cause for an evidentiary hearing.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. 49456

STATE OF MISSOURI,

Respondent,

vs.

REMON M. LEE,

Appellant.

Appeal from the Circuit Court of
Jackson County, Missouri
Sixteenth Judicial Circuit
The Honorable Anthony P. Nugent, Trial Judge
The Honorable Thomas C. Clark, PCR Judge

RESPONDENT'S STATEMENT,
BRIEF AND ARGUMENT

Respectfully submitted,

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INDEX

	Page
JURISDICTIONAL STATEMENT	3
STATEMENT OF FACTS	4
POINTS RELIED ON	7
ARGUMENT	
POINT I	11
POINT II	18
CONCLUSION	24

JURISDICTIONAL STATEMENT

This appeal is from a conviction for the felonies of murder in the first degree, § 565.020, RSMo 1994, and armed criminal action, § 571.015, RSMo 1994, obtained in the Circuit Court of Jackson County, Missouri, for which appellant was sentenced to life imprisonment without parole in the Missouri Department of Corrections for the count of murder in the first degree and ten years imprisonment in the Missouri Department of Corrections on the count of armed criminal action. This appeal is also from the denial of appellant's Rule 29.15 motion. The appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Remon Lee, was charged by indictment filed on March 12, 1993 (L.F. 1-2), and later by information in lieu of indictment (L.F. 5-6), as a prior and persistent offender, §558.016, 557.036, and 558.019, RSMo 1994, with murder in the first degree, §565.020, RSMo 1994, and armed criminal action, §571.015, RSMo 1994.[1] On February 22, 1994, the cause proceeded to trial before the Honorable Anthony P. Nugent (Tr. 11).

Appellant does not challenge the sufficiency of the evidence adduced at trial which viewed in the light most favorable to the verdict is as follows: On the afternoon of August 27, 1992, Reginald Williams and William Sanders were at a vacant lot on Monroe between 67th and 68th Streets in Jackson County trying to start Williams' Moped (Tr. 205-206, 260, 384-385). While trying to start the Moped, a rusty

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[1] All statutory citations are to RSMo 1994, unless otherwise noted.

red or orange and white older model Chevrolet pickup truck drove past them (Tr. 207, 209, 386). Both Williams and Sanders identified appellant in court as the driver of the pickup truck (Tr. 208, 414). Appellant was the only person in the truck (Tr. 211, 388).

Appellant drove by Williams and Sanders southbound on Monroe without "really paying no attention . . . first" (Tr. 208-209). Appellant then turned his truck around in a driveway across the street from Williams and Sanders (Tr. 210, 386). As appellant proceeded back north on Monroe, he drove "real slow" past Williams and Sanders and stared at them for approximately ten seconds (Tr. 212, 386, 399). Appellant then stopped the truck on Monroe a short distance away from Williams and Sanders (Tr. 388, 402).

Upon observing the truck, Sanders told Williams "put the bike up, because, you know, something's about to go down. . . . man, he's up here too long, dude, put the bike up" (Tr. 389). Sanders later testified at trial that he knew "something was about to go down by the way [appellant] stared at us" (Tr. 389). However, Williams and Sanders remained at the vacant lot.

Approximately thirty minutes after appellant had stopped on Monroe, a blue Chevy Nova came around the corner with a driver and one passenger and stopped on Monroe directly across from appellant's truck (Tr. 215, 390). The passenger, Reginald Rhodes, exited the passenger side of the car, came around to the driver's side, and shot the driver, Steve Shelby, several times in the shoulder, head and neck (Tr. 214-215, 390, 394, 402, 410-411). The shooter Rhodes then entered appellant's waiting truck, and appellant "burnt rubber" away from the scene (Tr. 220, 390, 401). The driver of the Nova, Steve Shelby, died from nine close range gunshot wounds to his left shoulder, head, and neck (Tr. 436-439).

Later that day, Williams identified appellant as the driver of the truck from a photo lineup (Tr. 226-227, 355-356). Williams also identified appellant as the driver from two videotape lineups (Tr. 230, 365, 369-372). Sanders gave the police a description of the driver which matched appellant (Tr. 393, 412). Sanders also identified a photo of appellant from a lineup but told police that he could not say for sure that appellant was the driver without seeing a better picture (Tr. 411).

Rhonda Shelby, the victim's sister, and her neighbor Lynne Bryant, both testified at trial that on August 26, 1992, the night before the murder, appellant and Reginald Rhodes were in an orange or red pickup truck looking for the victim, Steve Shelby (Tr. 443-445, 452-453, 455-456, 471-473, 478).

The jury found appellant guilty (L.F. 34, 36). On April 19, 1994, Judge Nugent sentenced appellant to life in the Missouri Department of Corrections without the benefit of parole or possibility of probation for the count of murder in the first degree plus ten years for the armed criminal action count (Sent. Tr. 8).

On April 29, 1994, appellant filed a notice of appeal (L.F. 54). Appellant apparently submitted a *pro se* motion to vacate, set aside or correct the judgment or sentence on November 21, 1994 (PCR L.F. 1-14). On July 3, 1995, appellant filed a first amended application for post-conviction relief pursuant to Rule 29.15 (PCR L.F. 20-30). On August 21, 1995, Judge Thomas Clark, issued findings of fact and conclusions of law denying appellant's Rule 29.15 motion without an evidentiary hearing (PCR L.F. 32-46). Appellant filed a notice of appeal on October 2, 1995 (PCR L.F. 48). This appeal follows.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S REQUEST FOR A CONTINUANCE DUE TO ALLEGED MISSING WITNESSES, FILED AFTER THE STATE'S CASE IN CHIEF, BECAUSE APPELLANT FAILED TO MEET THE REQUIREMENTS OF SUPREME COURT RULE 24.10 TO THE SATISFACTION OF THE TRIAL COURT IN THAT APPELLANT FAILED TO SHOW THE MATERIALITY OF THE WITNESSES' TESTIMONY, TO SET FORTH THE PARTICULAR FACTS THE WITNESSES WERE SUPPOSED TO PROVE, TO SHOW THAT THE ATTENDANCE OF THE WITNESSES WOULD BE PROCURED WITHIN A REASONABLE TIME, AND THAT THE WITNESSES' ABSENCE WAS NOT DUE TO HIS OWN PROCUREMENT. FURTHERMORE, THE TRIAL COURT'S DECISION SHOULD NOT BE REVERSED ON APPEAL BECAUSE APPELLANT HAS FAILED TO SHOW A REASONABLE PROBABILITY THAT THE WITNESSES' TESTIMONY WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL IN THAT THE STATE'S EVIDENCE OF HIS GUILT WAS OVERWHELMING.

State v. Schaal, 806 S.W.2d 659 (Mo. banc 1991), *cert. denied*, 112 S.Ct. 976 (1992);
State v. Gregory, 832 S.W.2d 526 (Mo.App., S.D. 1992);
State v. Brookins, 468 S.W.2d 42 (Mo. 1971);
State v. Menteer, 845 S.W.2d 581 (Mo.App., E.D. 1992);
State v. Winston, 627 S.W.2d 915 (Mo.App., W.D. 1982);
State v. Gaskin, 618 S.W.2d 620 (Mo. 1981);
State v. Fuller, 837 S.W.2d 304 (Mo.App. W.D. 1992);

State v. Reece, 505 S.W.2d 50 (Mo. 1974);
State v. Davis, 625 S.W.2d 903 (Mo.App. W.D. 1981);
Supreme Court Rule 24.10.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S RULE 29.15 MOTION ALLEGING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL APPELLANT'S CODEFENDANT TO TESTIFY BECAUSE 1) THE RECORD REFUTES APPELLANT'S CLAIM IN THAT AT THE TIME OF TRIAL HE NO LONGER WANTED THE WITNESS CALLED, 2) THE DECISION TO CALL THE WITNESS WAS A MATTER OF TRIAL STRATEGY, AND 3) APPELLANT FAILED TO ALLEGE THAT THE WITNESS WAS AVAILABLE AND WILLING TO TESTIFY. FURTHERMORE, THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE ON THE GROUND THAT "THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S MOTION FOR CONTINUANCE," BECAUSE 1) APPELLANT DOES NOT ALLEGE THAT HIS TRIAL COUNSEL ACTED UNREASONABLY, 2) APPELLANT'S CLAIM IS AN IMPERMISSIBLE ATTEMPT TO ARGUE THE SAME CLAIM HE RAISED ON DIRECT APPEAL, AND 3) APPELLANT FAILED TO PLEAD FACTS TO SUPPORT HIS CLAIM.

Day v. State, 770 S.W.2d 692 (Mo. banc), *cert. denied sub nom. Walker v. Missouri*, 493 U.S. 866 (1989);
Antwine v. State, 791 S.W.2d 403 (Mo. banc 1990), *cert denied*, 498 U.S. 1055 (1991);
Lestourgeon v. State, 837 S.W.2d 588 (Mo.App., W.D. 1992);

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984);
State v. Preston, 861 S.W.2d 627 (Mo.App., E.D. 1993);
Eberspacher v. State, 915 S.W.2d 384 (Mo.App. W.D. 1996);
Eldridge v. State, 592 S.W.2d 738 (Mo. banc 1979);
State v. White, 870 S.W.2d 869 (Mo.App. W.D. 1993);
State v. Dudley, 819 S.W.2d 51 (Mo. App. S.D. 1991);
State v. Twenter, 818 S.W.2d 628 (Mo. banc 1991);
State v. Kirk, 918 S.W.2d 307 (Mo.App. S.D. 1996);
Supreme Court Rule 29.15.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S REQUEST FOR A CONTINUANCE DUE TO ALLEGED MISSING WITNESSES, FILED AFTER THE STATE'S CASE IN CHIEF, BECAUSE APPELLANT FAILED TO MEET THE REQUIREMENTS OF SUPREME COURT RULE 24.10 TO THE SATISFACTION OF THE TRIAL COURT IN THAT APPELLANT FAILED TO SHOW THE MATERIALITY OF THE WITNESSES' TESTIMONY, TO SET FORTH THE PARTICULAR FACTS THE WITNESSES WERE SUPPOSED TO PROVE, TO SHOW THAT THE ATTENDANCE OF THE WITNESSES WOULD BE PROCURED WITHIN A REASONABLE TIME, AND THAT THE WITNESSES' ABSENCE WAS NOT DUE TO HIS OWN PROCUREMENT. FURTHERMORE, THE TRIAL COURT'S DECISION SHOULD NOT BE REVERSED ON APPEAL BECAUSE APPELLANT HAS FAILED TO SHOW A REASONABLE PROBABILITY THAT THE WITNESSES' TESTIMONY WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL IN THAT THE STATE'S EVIDENCE OF HIS GUILT WAS OVERWHELMING.

Appellant alleges that the trial court abused its discretion when it overruled appellant's motion for a continuance because his stepfather James Edwards, his mother Gladys Edwards, and his sister Laura Lee "mysteriously disappeared from the Courthouse before testifying" (App. Br. 11). Even though appellant did not allege what the three would testify to while making the motion, appellant alleges in his brief that the three were "alibi witnesses" (App. Br 11). Appellant also alleges that "the trial court's reasons for denying the continuance had nothing to do with the case itself, but rather with the Court's personal schedule (App. Br. 11).

Appellant's case in chief began on the morning of the third day of trial (Tr. 491). Appellant's counsel had apparently subpoenaed all three witnesses to show up at 9:00 am (Tr. 580-582). While appellant never actually attempted to call any of the three to the stand, when Court resumed at 1:00 pm after the noon recess (Tr. 572), he alleged that all three had left at 11:00 am (Tr. 576). Neither appellant or his counsel knew where they were or how to get in touch with them (Tr. 576). Also, appellant's girlfriend tried to find them but could not (Tr. 576).

Appellant stated that he would like a "couple hours' continuance" to try and locate them (Tr. 577). Appellant's counsel then asked for a continuance until 9:30 am, Friday, the following day (Tr. 580). The following dialog then took place:

> THE COURT: Well, I'm going to have to deny the motion for continuance. It looks to me as though the folks were here and then in effect abandoned the defendant. And that, of course, we can't—we can't blame on the State. The State had absolutely nothing to do with that. That's—it's too bad. The Court will not be able to be here tomorrow to try the case.
>
> APPELLANT'S COUNSEL: How about Monday, Judge? The jury's not locked up. Could we set it over until Monday morning?
>
> THE COURT: I've got another case set for trial that will take a week starting Monday morning. I'm not in a position to grant a continuance under these circumstances. The folks were here today. They were seen here on this floor of the Courthouse, and they apparently simply have abandoned—
>
> APPELLANT'S COUNSEL: Well—
>
> THE COURT: —the defendant in—although they're family, despite the fact that they're under subpoena.

> APPELLANT'S COUNSEL: It looks like that, Judge. I Don't know. I would—I can neither confirm nor deny. It may be that someone threatened them, but I have no proof of that. They may, as the Court said, have been abandoned. I don't know.
>
> THE COURT: I have to deny the motion for continuance.
>
> APPELLANT'S COUNSEL: All right, Sir.
>
> THE COURT: We have to go ahead with the trial.

(Tr. 582-584).

The decision to grant or deny a continuance rests within the sound discretion of the trial court, and a very strong showing is required to prove an abuse of that discretion. *State v. Schaal*, 806 S.W.2d 659, 666 (Mo. banc 1991), *cert. denied*, 112 S.Ct. 976 (1992); *State v. Gregory*, 832 S.W.2d 526, 528 (Mo.App., S.D. 1992); *State v. Brookins*, 468 S.W.2d 42, 45 (Mo. 1971). Generally, "[b]efore a refusal to grant a continuance will constitute an abuse of discretion, a defendant must demonstrate that the denial of the continuance prejudiced his defense." *State v. Edwards*, 657 S.W.2d 343, 345 (Mo.App., S.D. 1983). The party requesting the continuance bears the burden of showing the requisite prejudice. *State v. Menteer*, 845 S.W.2d 581, 584 (Mo.App., E.D. 1992). When an appellate court is called upon to review the discretion exercised by a trial court in refusing to grant a continuance, "every intendment of the trial court's action is indulged." *State v. Winston*, 627 S.W.2d 915, 917 (Mo.App., W.D. 1982) citing *State v. Gaskin*, 618 S.W.2d 620, 626 (Mo. 1981)

Supreme Court Rule 24.10 specifically addresses applications for continuances on account of the absence of witnesses. Rule 24.10 requires that an application for continuance because of missing witnesses show:

(a) The facts showing the materiality of the evidence sought to be obtained and due diligence upon the part of the applicant to obtain such witness or testimony;

(b) [F]acts showing reasonable grounds for belief that the attendance or testimony of such witness will be procured within a reasonable time;

(c) What particular facts the affiant believes the witness will provide, and that he knows of no other person whose evidence or attendance he could have procured at trial, by whom he can prove or so fully prove the same facts;

(d) That such witness is not absent by the connivance, consent, or procurement of the applicant, and such application is not made for vexation or delay. . . ;

At trial when appellant requested the continuance, appellant made no showing of the materiality of the testimony of James Edwards, Gladys Edwards, or Laura Lee. Supreme Court Rule 24.10(a). Neither did appellant set forth the particular facts he believed the three would prove. Supreme Court Rule 24.10(c).

Appellant did not set forth any facts showing reasonable grounds for belief that the attendance or testimony of the witnesses would be produced within a reasonable time. Supreme Court Rule 24.10(b). The Missouri Supreme Court has specifically held that "[t]his is not a hollow admonition, and one seeking a continuance on account of the absence of a witness must produce facts which satisfy a court that the attendance or testimony or an absent witness can be procured within a reasonable time." *State v. Winston,* supra at 918. Furthermore, appellant did not testify that the witnesses absence was not due to his own procurement. Supreme Court Rule 24.10(d).

Even if appellant had met all the requirements of Rule 24.10, the decision to grant the continuance would still be at

discretion of the Court "if the court shall be of the opinion that the affidavit is sufficient." Supreme Court Rule 24.10. The fact that appellant's request for a continuance was not sufficient establishes that the court's denial of the motion was not an abuse of discretion.

Appellant alleges that Judge Nugent overruled his continuance solely because the Judge's daughter was going to be in the hospital the next day (App. Br 16). However, Judge Nugent simply stated to the attorneys that court would not be in session the following day because he had to be at the hospital with his daughter (Tr. 580). For whatever reason court was not in session the following day, whether Judge Nugent's daughter was being admitted to the hospital or whether Judge Nugent himself was being admitted, is irrelevant to the merits of appellant's request for a continuance. The fact that appellant's continuance request did not satisfy the safeguards of Rule 24.10 makes his argument that his motion was denied solely for the Judge's personal reasons incredible.

Furthermore, in order to warrant reversal on appeal, the appellant must show that it is reasonably probable that the witness's testimony would change the outcome of the trial. *State v. Fuller*, 837 5.W.2d 304, 307 (Mo.App. W.D. 1992); *State v. Reece*, 505 S.W.2d 50, 52 (Mo. 1974); *State v. Davis*, 625 S.W.2d 903, 905 (Mo.App. W.D. 1981). Appellant alleges in his motion for new trial and his brief that his stepfather James Edwards, his mother Gladys Edwards, and his sister Laura Lee would have provided alibi testimony that appellant was not in Missouri, but rather in the State of California on August 27, 1992, at the time of the murder. (L.F. 52; App. Br 14). Appellant further alleges in his amended Rule 29.15 motion that the three witnesses would have testified that he was in California "for the entire month of August, 1992" (PCR L.F. 21).

Even if the witnesses did provide such testimony, which there is absolutely no evidence that they would have testified to such facts, appellant has not established that the outcome of his trial would have been any different had they testified. Eyewitnesses to the murder identified appellant as the driver of the get-away truck both immediately after the incident and in court. (Tr. 208, 226-227, 230,265, 355-356, 369-372, 411, 414). Also, the victims sister and her neighbor both testified that the night before the murder appellant came to their apartment complex looking for the victim (Tr. 443-445, 452-453, 455-456, 471-473, 478). Because the State produced overwhelming evidence that appellant was in Jackson County both the day of the murder and the previous night, it is highly improbable that the jury would have found that he was in California for "the entire month of August."

Because appellant failed to prove an abuse of discretion by a "very strong showing," and failed to prove that the outcome of his trial would have been different had his stepfather, mother and sister testified, his first point should be denied.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S RULE 29.15 MOTION ALLEGING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL APPELLANT'S CODEFENDANT TO TESTIFY BECAUSE 1) THE RECORD REFUTES APPELLANT'S CLAIM IN THAT AT THE TIME OF TRIAL HE NO LONGER WANTED THE WITNESS CALLED, 2) THE DECISION TO CALL THE WITNESS WAS A MATTER OF TRIAL STRATEGY, AND 3) APPELLANT FAILED TO ALLEGE THAT THE WITNESS WAS AVAILABLE AND WILLING TO TESTIFY. FURTHERMORE , THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S

RULE 29.15 CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE ON THE GROUND THAT "THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S MOTION FORCONTINUANCE," BECAUSE 1) APPELLANT DOES NOT ALLEGE THAT HIS TRIAL COUNSEL ACTED UNREASONABLY, 2) APPELLANT'S CLAIM IS AN IMPERMISSIBLE ATTEMPT TO ARGUE THE SAME CLAIM HE RAISED ON DIRECT APPEAL, AND 3) APPELLANT FAILED TO PLEAD FACTS TO SUPPORT HIS CLAIM.

Appellant claims that the motion court erred in denying his claim of ineffective assistance of counsel for his trial counsel's failure to call "appellant's codefendant Reginald Rhodes to testify on appellant's behalf that appellant was not involved in the shooting death of Steve Shelby" (App. Br 18). Specifically, appellant alleges that his "defense counsel did not investigate the *possibility* that Reginald Rhodes *might be willing* to testify on appellant's behalf" (App. Br. 22) (emphasis added). Appellant also alleges that he is entitled to post-conviction relief because "the trial court overruled defense counsel's motion for continuance after appellant's alibi witnesses mysteriously disappeared from the courthouse" (App. Br 18). Appellant does not allege that his trial counsel was in any way ineffective in seeking the continuance or that his counsel was in any way responsible for the witnesses leaving the courthouse (App. Br. 24).

Appellate court review of the denial of post-conviction relief is limited to a determination of whether the findings, conclusions, and judgment of the motion court are clearly erroneous. *Day v. State*, 770 S.W.2d 692, 695-696 (Mo. banc), *cert. denied sub nom, Walker v. Missouri*, 493 U.S. 866 (1989). Such findings and conclusions are presumed correct and only deemed clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm impression that a mistake has been made. *Antwine v.*

State, 791 S.W.2d 403, 406 (Mo. banc 1990), *cert denied*, 498 U.S. 1055 (1991). The party contesting the motion court's findings has the burden of showing them to be clearly erroneous. *Lestourgeon v. State*, 837 S.W.2d 588, 590 (Mo.App., W.D. 1992).

Appellant's claim of ineffective assistance of counsel is subject to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). To prevail, appellant must demonstrate 1) that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances, and 2) that he was prejudiced by such a failure. *Id.*, 466 U.S. at 687.

To be entitled to an evidentiary hearing on the issue of ineffective assistance of counsel, a movant seeking relief under Rule 29.15 must plead facts, not conclusions, which if true, would warrant relief. *State v. Preston*, 861 S.W.2d 627, 632 (Mo.App., E.D. 1993). The allegations must not be refuted by the record, and the matters complained of must have prejudiced the movant. *Id.* A hearing is not required if the motion, files and records of the case conclusively show that the movant is not entitled to relief. *Id.*

Appellant first alleges that his trial counsel was ineffective in not calling "appellant's codefendant Reginald Rhodes to testify on appellant's behalf that appellant was not involved in the shooting death of Steve Shelby" (App. Br 18). Specifically, appellant alleges that his "defense counsel did not investigate the *possibility* that Reginald Rhodes *might be willing* to testify on appellant's behalf" (App. Br. 22) (emphasis added).

At appellant's sentencing, appellant testified that he wanted his trial counsel to call his co-defendant, Reginald Rhodes, who had previously pled guilty to being the shooter, to testify that appellant "had no involvement in this crime, that [appellant] wasn't present, that [appellant] had no knowledge

of it" (Sent Tr. 10, 13-14). Appellant's trial counsel responded to this saying:

> Well, I have no recollection at all. I'll check my file again, but I have no recollection at all of you ever telling me about that, or I would certainly have had him there if I could.
>
> * * *
>
> In my opinion, I doubt very much if a jury would believe you. It's been my experience in 40 years of trying criminal cases that they wouldn't believe him anyway to exonerate you completely in view of the State's testimony.

(Sent Tr. 14). The following dialog then transpired between appellant and his trial counsel while appellant was under oath:

> COUNSEL: Sir, I take it your recollection is that you told me about that before trial?
>
> APPELLANT: Before trial. Yes.
>
> COUNSEL: Why didn't you tell me about it during the trial so we could at least sent (sic) the subpoena or writ out?
>
> APPELLANT: Well, my understanding—I had told you about all the witnesses I want, and you told me you have subpoenaed everyone. And then—
>
> COUNSEL: But I told you in advance who our witnesses were going to be. Don't you remember? Your mother, your father and your sister?
>
> APPELLANT: Right.
>
> COUNSEL: And you made no mention of this other witness you're talking about. Why didn't you say, "Well, you didn't get that guy for me."?

APPELLANT: You had told me in the visiting room over at the county jail that wouldn't no jury believe him anyway.

COUNSEL: I'm sure I did. Just like I told you now.

(Sent. Tr. 15-16).

As the above dialog demonstrates, appellant's claim is directly refuted by the record in that at the time of trial appellant no longer wished to call Reginald Rhodes to the stand. Appellant's trial counsel could not be ineffective in failing to call a witness that appellant no longer wished to call. *Eberspacher v. State*, 915 S.W.2d 384, 387 (Mo.App. W.D. 1996).

Furthermore, the motion court was not clearly erroneous in finding that the decision to not call Reginald Rhodes was a matter of trial strategy (PCR L.F. 37-38). "If an attorney believes that the testimony of an alibi witness would not unqualifiedly support his client's position, it is a matter of trial strategy not to call him to the stand." *Eldridge v. State*, 592 S.W.2d 738, 741 (Mo. banc 1979). The selection of witnesses remains a question of trial strategy that is "virtually unchallengeable" in a post-conviction proceeding. *State v. White*, 870 S.W.2d 869, 875 (Mo.App. W.D. 1993).

The motion court further found that appellant failed to allege "whether counsel was informed or had any knowledge of Reginald Rhodes willingness to testify on movant's behalf" (PCR L.F. 38). See *State v. Dudley*, 819 S.W.2d 51, 56 (Mo. App. S.D. 1991).

Appellant also alleges that his trial counsel was ineffective because "the trial court overruled defense counsel's motion for continuance after appellant's alibi witnesses mysteriously disappeared from the courthouse" (App. Br 18). Appellant does not allege that his trial counsel was in any way ineffective in seeking the continuance or that his counsel was in any way responsible for the witnesses leaving the

courthouse (App. Br. 24). Accordingly, the motion court was not erroneous in finding that appellant failed to carry his burden of showing that his trial counsel was in any way at fault for the disappearance of the witnesses (PCR L.F. 34). See *State v. Twenter*, 818 S.W.2d 628, 637 (Mo. banc 1991). Absent a showing that appellant's trial counsel acted unreasonably, appellant fails to satisfy the first prong of *Strickland. Strickland v. Washington, supra* at 687.

Furthermore, appellant's claim is an impermissible attempt to raise the same claim he raised on direct appeal in Point I.[2] *State v. Kirk*, 918 S.W.2d 307, 310 (Mo.App. S.D. 1996). While appellant does add the additional assertion to his PCR claim that "since his trial [appellant] has learned that an unknown person, believed to have been employed by the Jackson County Prosecutor's Office, told appellant's alibi witnesses that they could leave the courthouse because their testimony was not needed" (App. Br 23), the assertion is a self-serving conclusion unsupported by any evidence. Appellant does not allege in his 29.15 motion who this mystery person is, how it is "believed" that such person was from the Jackson County Prosecutor's Office, or what evidence or witnesses would testify to such allegations at an evidentiary hearing (PCR L.F. 23-25). See *State v. Preston*, *supra*.

For all the forgoing reason's, appellant's second point on appeal fails.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence and the denial of his Rule 29.15 motion should be affirmed.

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[2]The merits of appellant's claim are addressed in Point I, *supra*.

Respectfully submitted,

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 49456
Consolidated with WD 51717

ORDER FILED:
OCTOBER 22, 1996

STATE OF MISSOURI,
Respondent,
v.
REMON M. LEE,
Appellant.

REMON M. LEE,
Appellant,
v.
STATE OF MISSOURI,
Respondent.

Appeal From the Circuit Court of Jackson County,
Missouri Honorable Anthony P. Nugent, Jr., Judge

Before: Spinden, P.J., Smart and Smith, JJ

ORDER

PER CURIAM

Appeal from judgment of conviction for murder in the first degree, § 565.020 RSMo 1994, and armed criminal action, § 571.015 RSMo 1994, and order denying Rule 29.15 motion without an evidentiary hearing.

Judgment of conviction and order denying Rule 29.15 motion affirmed. Rule 30.25(b); and Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 49456
Consolidated with WD 51717

FILED:
OCTOBER 22, 1996

STATE OF MISSOURI,
Respondent,

v.

REMON M. LEE,
Appellant.

REMON M. LEE,
Appellant,

v.

STATE OF MISSOURI,
Respondent.

MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING JUDGMENT PURSUANT TO
RULE 84.16(b) and 30.25(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE TH1S COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

This is a consolidated appeal pursuant to Rule 29.15(l). Remon Lee (hereinafter appellant) was convicted of the felonies of murder in the first degree, § 565.020[1], and armed criminal action, § 571.015. The appellant was sentenced to concurrent terms of life imprisonment without parole for murder in the first degree and ten years imprisonment for armed criminal action.

On direct appeal, appellant alleges that the trial court erred in overruling appellant's motion for continuance after his alibi witnesses disappeared from the courthouse before they were to testify. In appealing the denial of his Rule 29.15 motion without an evidentiary hearing, appellant alleges: 1) his trial counsel was ineffective in that he failed to call a particular witness to testify at trial; and 2) because appellant's motion for continuance to locate his alibi witnesses was overruled, his trial counsel was unable to adequately represent him.

We affirm.

FACTS

Appellant, Remon Lee, was charged with one count of murder in the first degree and one count of armed criminal action for the shooting death of Steve Shelby. On August 27, 1992, Reginald Williams and Williams Sanders first saw Lee drive a rusty orange or red truck southbound on Monroe Street in Jackson County, then saw Lee park the truck. After about thirty minutes, Williams and Sanders saw a blue Chevy Nova stop on Monroe Street, directly across from the truck where Lee was waiting. The passenger of the Nova, Reginald Rhodes, exited the car and walked around to the driver's side. Rhodes then began firing shots into the driver's side of the Nova where Shelby was sitting. After hitting Shelby several times in the shoulder, head and neck, Rhodes ran behind

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[1] All statutory references are to RSMo 1994, unless otherwise indicated.

Lee's truck and got into the passenger side. Leaving tire tracks in the street, Lee and Rhodes quickly drove away from the scene. Shelby later died of gunshot wounds that caused penetrating injuries to the brain. The seven bullets that were recovered were all fired from the same gun.

The two men who witnessed the events that took place, Williams and Sanders, were questioned and shown police lineups. Williams identified appellant as the driver after viewing photographic and video lineups. Sanders picked Rhodes as the shooter out of a photographic lineup and at trial identified appellant as the driver of the truck. Other testimony also placed appellant and Rhodes at the scene of the shooting.

For appellant's defense, he was planning to have three subpoenaed family members from California voluntarily testify that he was with them during the month the murder took place. Although these witnesses were at the courthouse during the morning session, they could not be located after the lunch recess. Because he believed his family to still be in town for a religious activity that evening, appellant asked his attorney to move for a continuance so that his witnesses could testify the next morning. The court overruled the motion, as the judge determined appellant's family had "abandoned" him. The judge also stated that he could not continue the trial because his daughter was to be in surgery and he was going to stay with her all day.

The court overruled appellant's motion for judgment of acquittal at the close of the state's evidence and at the close of all of the evidence. Appellant filed a notice of appeal on April 29, 1994, a *pro se* motion to vacate, set aside or correct the judgment or sentence on November 21, 1994, and an amended application for postconviction relief on July 3, 1995. Without an evidentiary hearing, the motion court denied appellant's Rule 29.15 motion. Appellant now appeals his conviction and the denial of his Rule 29.1 5 motion without an evidentiary hearing.

I. DIRECT APPEAL

STANDARD OF REVIEW

As held by the Missouri Supreme Court in *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 207 (Mo. banc 1991), our standard of review is as follows:

> As a general principal, the grant or denial of a continuance is largely within the discretion of the trial court. In reviewing a trial court's denial of a continuance based on absence of witnesses, every intendment is made favoring the correctness of that ruling. The denial of a continuance is rarely reversible error, but the trial court does not enjoy absolute or arbitrary discretion. (citations omitted).

Id. The trial court may take into account the probability that a missing witness may or may not be found, and a refusal to grant a motion for continuance will only be reversed if it is ". . . reasonably probable that the witness' testimony will result in a different outcome." *State v. Fuller*, 837 S.W.2d 304, 307 (Mo. App. 1992).

DISCUSSION

Appellant asserts that the trial court erred by failing to grant his motion for continuance. Missouri Supreme Court Rule 24.09 concerns the process by which applicants can secure a motion for continuance in a misdemeanor or felony trial:

> An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally

Rule 24.09; *State v. Morin*, 873 S.W.2d 858, 871 (Mo. App. 1994). After a careful review of the transcript and legal file,

we find that appellant's motion was oral, although we find no indication of the State's consent to this deviation, as is required by Rule 24.09. Thus, the trial court could have properly denied the motion for a failure to comply with Rule 24.09.

Even assuming, *arguendo,* that the oral motion was sufficient, appellant's argument still fails. Whether the motion is written or oral, Rule 24.10 sets out the required elements for a continuance to be granted on the basis of an absent witness:

> (a) The facts showing the materiality of the evidence sought to be obtained and due diligence upon the part of the applicant to obtain such witness or testimony;
>
> (b) The name and residence of such witness, if known, or, if not known, the use of diligence to obtain the same, and also facts showing reasonable grounds for belief that the attendance or testimony of such witness will be procured within a reasonable time;
>
> (c) What particular facts the affiant believes the witness will prove, and that he knows of no other person whose evidence or attendance he could have procured at the trial, by whom he can prove or so fully prove the same facts;
>
> (d) That such witness is not absent by the connivance, consent, or procurement of the applicant, and such application is not made for vexation or delay, but in good faith for the purpose of obtaining a fair and impartial trial.

Rule 24.10. After a careful review of the record, we find appellant's motion was made without the factual showing required by Rule 24.10. When a denial to grant a motion for continuance is based on a deficient application, it does not constitute an abuse of discretion. *Morin,* 873 S.W.2d at 871. As appellant has the burden of establishing that the trial court

abused its discretion in denying his motion for continuance, we find that the trial court did not abuse its discretion here. *Fuller,* 837 S.W.2d at 307.

Even if appellant had established an abuse of discretion by the trial court in denying his motion, he cannot show prejudice thereby, which is necessary to prevail on this point. *Id.* In order to show prejudice, appellant has the burden of showing that the testimony of the absent witnesses was so crucial that it is reasonably probable a different outcome would have resulted. *Id.*

Point denied.

II. POSTCONVICTION RELIEF MOTION

STANDARD OF REVIEW

Appellate review of the motion court's denial of a postconviction relief motion is not a de novo review; rather, the findings of fact and conclusions of law of the motion court are presumptively correct. *Wilson v.* State, 813 S.W.2d 833, 835 (Mo. banc 1991). Review of a motion court's actions is limited to a determination of whether the trial court's findings and conclusions are clearly erroneous. Rule 29.15; *State v. Driver,* 912 S.W.2d 52, 54 (Mo. banc 1995). Findings and conclusions are deemed clearly erroneous only if, after reviewing the entire record, we are left with the definite and firm impression that a mistake has been made. *Wilson,* 813 S.W.2d at 835.

DISCUSSION

To prove ineffective assistance of counsel, the movant must show that: 1) trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the existing circumstances; and that 2) he or she was prejudiced by such conduct or lack thereof. *Strickland v. Washington,*

466 U.S. 668, 687 (1984). The movant must show a reasonable probability that, but for his attorney's unprofessional errors, the result of the proceeding would have been different. *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc 1994), *cert. denied*, 1 15 S. Ct. 371 (1994).

> Movant faces a heavy burden in establishing a claim for ineffective assistance of counsel. Not only must the defendant prove his or her allegations by a preponderance of the evidence, but the defendant must overcome the court's presumption that counsel is competent.

Yoakum v. State, 849 S.W.2d 685, 687 (Mo. App. 1993) (citations omitted). Reasonable trial strategy will not support an ineffective assistance of counsel claim. *Harris*, 870 S.W.2d at 814.

To be entitled to an evidentiary hearing, 1) a movant must allege facts, not conclusions, which, if true, would warrant relief; 2) the facts must raise matters not refuted by the record; and, 3) the matters complained of must have resulted in prejudice to the movant. *Driver*, 912 S.W.2d at 55.

A. FAILURE TO CALL A MATERIAL WITNESS

Appellant first alleges that he was denied effective assistance of counsel because his trial counsel failed to investigate and call a witness to testify who was material to his defense. Appellant contends that a reasonably competent attorney would have called as a witness appellant's co-defendant, Reginald Rhodes. We disagree.

The courts have held that attorneys may decide which evidence and witnesses to use at trial as a matter of trial strategy. *State v. White*, 870 S.W.2d 869, 875 (Mo. App. 1993), *citing Leisure v. State*, 828 S.W.2d 872, 875 (Mo. banc 1992), *cert. denied*, 506 U.S. 923, 113 S. Ct. 343, 121 L. Ed.2d 259 (1992). As such, the attorney's decision making is

"virtually unchallengeable." *White*, 870 S.W.2d at 875. Appellants claiming ineffective assistance of counsel on the basis of witness selection must not only show that the witness would have testified if called, but that this testimony would have been of benefit to the appellant. *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995). "If counsel believes that the witness's testimony would not unqualifiedly support the defense, the decision of whether to call the witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel." *Id.* The record here clearly reflects the misgivings appellant's attorney had in presenting Rhodes as a witness, and appellant has not persuaded us that Rhodes' testimony would have aided his defense. It is reasonable to infer that appellant's attorney determined that Rhodes, as a convicted murderer, would have had little credibility with the jury, and that his testimony would not have changed the outcome of the case.

As to appellant's assertion that his attorney failed to even investigate the possibility of Rhodes as a witness, this argument similarly fails. The failure to investigate a witness that a defendant has chosen not to present will not result in a finding of ineffective assistance of counsel. *Eberspacher v. State*, 915 S.W.2d 384, 387 (Mo. App. 1996). At his sentencing, appellant stated that Rhodes had agreed to testify that appellant had nothing to do with the victim's shooting, and that he wanted to have Rhodes testify to that effect. However, appellant's testimony at his sentencing hearing indicates that he and his attorney had discussed, but rejected the possibility of calling Rhodes as a witness. Appellant specifically testified that his attorney advised against calling Rhodes as a witness, and appellant acknowledged that he knew in advance the witnesses his attorney intended to call. Appellant cannot now claim ineffective assistance of counsel when the record reflects that he agreed and understood the witness in question would not testify.

We find that the record conclusively shows that the appellant is not entitled to postconviction relief, and that the motion court's finding that appellant did not prove that failure to call Rhodes as a witness was something other than trial strategy was not clearly erroneous.

B. DENIAL OF MOTION FOR CONTINUANCE

Appellant next alleges that he was denied effective assistance of counsel when the trial court overruled appellant's motion for a continuance. Appellant asserts that although his counsel did attempt to locate the missing witnesses, the outside forces that interfered with his attorney's preparation of the case rendered his representation ineffective. In *State v. Twenter*, 818 S.W.2d 628, 637 (Mo. banc 1991), the court held that to establish a claim for ineffective assistance of counsel where a witness does not testify, an appellant must show that his counsel is responsible for the failure of a witness to appear and testify. In his motion, the appellant does not allege any fault of trial counsel for the sudden disappearance of the witnesses in question that would establish ineffective assistance of counsel. The trial court found that appellant did not meet his burden of proof by producing any evidence to show that his trial counsel was in any way at fault for the disappearance and unavailability of the witnesses in question. We find that the trial court's findings to that effect are not clearly erroneous.

The record conclusively refutes that appellant is entitled to postconviction relief as claimed. Thus, we find that the motion court's findings and conclusions in denying postconviction relief without an evidentiary hearing are not clearly erroneous.

Point II denied.

CONCLUSION

The judgment of conviction and order denying appellant's Rule 29.1 5 motion are affirmed.

[Filed Jan. 16, 1998]

98-0074 CV-W8-P

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PERSONS IN STATE CUSTODY APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. SECTION 2254

Name : Remon Lee
Prison Number: 167441
Place of Confinement: Crossroads Cor. Cntr.
United States District Court Western District of Missouri
Case No: _____ (to be supplied by Clerk of the U.S. District Court)
Remon Lee PETITIONER v.
Mike Kemna RESPONDENT
(Name of Warden, Superintendent, Jailer, or authorized person having custody of petitioner.)
and
THE ATTORNEY GENERAL OF THE STATE OF Missouri

ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, petitioner should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

Instructions - Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Clerk of U.S. Courthouse, 811 Grand Ave., Kansas City, Missouri 64106

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Circuit Court of Jackson County, Missouri, KCMo
2. Date of judgment of conviction: February 24, 1994
3. Length of sentence: Life without Parole
4. Nature of offense involved (all counts): Murder 1st degree
5. What was your plea? (Check one)
   (a) Not guilty _x_
   (b) Guilty ___
   (c) Nolo Contendere ___

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

6. Kind of trial: (Check one) (a) Jury _x_ (b) Judge only ___
7. Did you testify at the trial? Yes [ ] No [x]
8. Did you appeal from the judgment of conviction Yes [x] No [ ]
9. If you did appeal, answer the following:
   (a) Name of court: Missouri Court of Appeals, Western District
   (b) Result: Affirmed
   (c) Date of result: Mandate issued January 23, 1997

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes [x] No [ ]

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court: Circuit Court of Jackson County, KCMo.

    (2) Nature of proceeding: 29.15

    (3) Grounds raised: Ineffective assistance of counsel

    see attached 29.15 motion

    (4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [x]

    (5) Result: Conviction Affirmed

    (6) Date of result: 8/21/95, findings & facts issued

    (b) As to any second petition, application, or motion give the same information:

    (1) Name of court: Missouri Court of Appeals, Western District

    (2) Nature of proceeding: Direct Appeal

    (3) Grounds raised: Abuse of Judicial Discretion; Denial of Continuance, failure to instruct on Alibi defense (see attached brief) ineffective assistance of counsel, denial of 29.15 without evidentiary hearing, (see attached brief)

    (4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [x]

    (5) Result: Conviction Affirmed

    (6) Date of result: 1/23/97

    (c) As to any third petition, application, or motion, give the same information:

    (1) Name of court: Motion for new trial, jackson county circuit court

    (2) Nature of proceeding: Judgement of Acquttal

    (3) Grounds raised: Insufficiency of evidence, Abuse of Judicial discretion; Denied right to be tried by Impartial trier of facts (see attached motion for new trial)

    (4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [x]

    (5) Result: motion denied

    (6) Date of result: filed March 7, 1994

    (d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

    (1) First petition, etc. Yes [x] No [ ]

    (2) Second petition, etc. Yes [x] No [ ]

    (3) Third petition, etc. Yes [x] No [ ]

    (e) If you did not appeal from the adverse action on any petition, application, or motion, explain why you did not:

    Lawyer did not appeal the decision of denying the new trial motion

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

    The state forced counsel on me against my will and the state denied me my right to be tried by an impartial trieer of facts

    (see attached) denied right to effective direct appeal counsel; denied due process right to a fair trial; improperly instructed jury (see attached)

A. Ground one: STATE FORCED COUNSEL ON ACCUSED

Supporting FACTS (tell your story briefly without citing cases or law):

First I had a paid lawyer, who withdrew for conflict, as witness; I spoke to another private attorney, who gave me a few weeks to secure the retainer fee, However the state forced unwanted public defender on me (see attached)

B. Ground two:

DENIED IMPARTIAL TRIER OF FACTS

Supporting FACTS (tell your story briefly without citing cases or law):

the judge belittled my unwanted counsel in front of the jury, causing them to laugh and disbelieve anything he said (see attached)

C. Ground three: PROSECUTORIAL MISCONDUCT

Supporting FACTS (tell your story briefly without citing cases or law):

The prosecutor instructed the court officer to have my alibi witnesses to wait outside the courtroom, THEN told them that their testimony wouldn't be needed until the following day, and then after they left the prosecutor rushed the state witnesses, and told the court my witnesses left

see attached

D. Ground four: INSUFFICIENCY OF EVIDENCE

(see attached)

Supporting FACTS (tell your story briefly without citing cases or law):

E. Ground five: Improper sentence (see attached)

A.

STATE COURT ERRED IN FORCING PETITIONER AGAINST HIS WILL TO ACCEPT A STATE APPOINTED COUNSEL

QUESTION:

Whether, a State may Constitutionally, hale a person into its criminal courts and there force a lawyer, not of his choosing, upon him, against his will?

RULE:

8th Cir. *Chamberlain v Ericksen*, 744 F2d 628, 630, Says, "Whether at trial or appeal a defendant is not required to accept unwanted counsel.

Adams v United States ex rel. McCann, 63 Sct 236, 241, The Court recognized that the 6th Amend. right to the assistance of counsel IMPLICITLY embodies a '*correlative right* to *dispense* with a lawyers help'. . . . When the administration of the criminal law . . . is hedged bout as it is by the Constitutional safeguards for the protection of an accused, TO DENY him in the exercise of *his free choice* the right to DISPENSE with some of these safeguards. . . is to imprison a man in his privileges and call it the Constitution. 63 Sct @ 241-242.

APPLICATION, CASE AT BENCH:

Petitioner retained counsel aprox., February of 1993, by October 1993 [pet'] became displeased with the services of Mr. Calbi [the retained counsel]. Pet' then wished to exercise HIS RIGHT to discharge the retained counsel. *Mo.Sct.rule 4, Rule 1.16* subsection1, and *comments* to rule 1.16, states: a Client has a right to discharge a lawyer at anytime, with or without cause, subject to liability for payment of the lawyers services. October 22, 1993 [Pet'] filed a pro se motion to discharge Mr. Calbi. In this motion the court was informed that NEW DESIRED counsel

would be *TOM SHANAHAN*. [*see pro se* motion to dismiss counsel in court file]

On November 19, 1993, a hearing was held before Judge Shinn to address the belief of Petitioner that there was an irreparable breakdown in the attorney client relationship between pet' & attorney Calbi, who subsequently filed additional suggestions to withdraw. Counsel stated that continuing representation will result in a violation of the rules of professional conduct or of law; which should be accepted as sufficient.

Judge Shinn, denied the motion of Petitioners to discharge attorney Calbi, and Judge Shinn also denied the motion of attorney Calbi to withdraw. So in essence, what Judge Shinn did was VIOLATE Petitioner's right TO DISPENSE COUNSEL, at the same time FORCE *unwanted counsel* upon Petitioner. A counsel that no longer had the desire to represent Petitioner, which is what happen, it left petitioner without representation.

Subsequently, Judge MASON, appointed James McMullin to represent Petitioner aproximately 2 months before trial, which was held February 23-24th, 1994. Although Petitioner explained to the court that he wished to hire a lawyer now that Mr. Calbi is allowed to be discharged from representing him [Pet'] on the case. However, the court appointed Mr. McMullin inspite of the pro se motion naming *TOM SHANANHAN* as counsel of choice.

Again, Petitioner was *FORCED BY THE STATE TO ACCEPT UNWANTED COUNSEL*, who not only did not have time to investigate but botched his *Alibi defense*, as clarified infra.

Therefore, the state should not have been allowed to force unwanted counsel upon Petitioner, Counsel of Choice *TOM SHANAHAN*, would have produced a different result.

CONCLUSION:

Section 35 of the *Judiciary Act* of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the 6th Amendment was proposed, provided that 'in *all* the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel . . . .' The right is currently *codified* in 28 USC § 1654. *See also, Mo. Constitution Art* 1 § 18(a), grants the accused the right to be heard, or to defend, in person and by counsel.

Surely this includes counsel of choice. This counsel James McMullin was not even aware that Reginald Rhodes had *pled guilty to* this very same shooting. And the court was under the impression that Reginald Rhodes was tried and found guilty. *Pet' Ex.A.1*, [Sentencing **13-14.

Examination by Mr. McMullin:

Q What was the name of the witness that you say had pled guilty?

A Reginald Rhodes . . . . he said that he would come to court and testify that I had no involvement in this crime, that I wasn't present, that I had no knowledge of it.

The Court:

Mr. McMullin, my [Judge Anthony P. Nugent] recollection of it is that *Rhodes* was tried by a *jury* and was *found guilty*, is that correct?

Mr. McMullin:

No. He pled guilty I THINK.

Its troubling, that a man is on trial for 1st degree murder and neither the Judge who is the *referee* nor the defense counsel who is the *guardian of freedom*, knows for sure if Petitioner is wrongfully tried for a charge that someone has

already pled guilty to. Reginald Rhodes could have simply been subpeona to court to clear Petitioner, had Forced counsel paid attention to Pet'. Further, the counsel that the *State forced on petitioner*, told the jury that the defense would be a *Defense of Alibi* during voir dire, attached as Petitioner [Ex A-2] trial trans.** 114-115, & 122. . . .

Mr McMullin:

> . . . "there will be a *defense of alibi* in this case . . . it is a valid legitimate defense, if you find it so, that he was not at the scene, was not even in town at the time. And *we'll put on evidence* . . . that he [Pet'] was somewhere else, he couldn't commit the crime and I *believe* the JUDGE WILL GIVE INSTRUCTIONS ON ALIBI at the conclusion of my case.

Noteworthy:

The Judge never instructed on alibi to the jury, and failed to instruct the jury that failure to prove alibi is not evidence of guilt.

And

> [Ex A-2,*122] Mr McMullin goes on to say: "Does anyone know GLADYS EDWARDS? LAURA LEE? MR JAMES EDWARDS? . . . a MINISTER . . these people drove from California to testify in support of the alibi defense. That Petitioner was in California at the time of this shooting death of Mr Shelby, in fact minister Edwards picked [pet'] up from the airport.

Noteworthy:

These people drove for over 1,000 miles and spent over $1,000 dollars of their own money to come clear Petitioner [with baggage & plane receipt to show Pet's arrival and departure to and from California].

OPENING STATEMENT:

Mr McMullin again pressed to the jury that the defense will be ALIBI DEFENSE, attached as Pet' Ex.A-3, [TT** 194-197], Mr. McMullin [counsel state forced upon pet'] goes on to say, "the next part of defense evidence will be, as I talked to you earlier, called an alibi. We WILL put on *three* (3) *witneses* for the defense, and you will see them and be able to evaluate them . . . YOU WILL HEAR, Mr James Edwards, Gladys Williams, and Laura Lee, essentially their testimony will be:

> "that Remon [Pet'] was in California from July through October 1992, they [meaning the witnesses] picked him up from the airport, in July for family gathering, combined birthdays of Remon [Pet'] & Lauras daughter, the birthdays fall on the 9th & 10th of July. They remember Remon [Pet'] being there in California in October, because they begged him to stay for the Holloween party on October 31st. Further, that Mr Edwards [minister] is the one who took Remon [Pet'] to the airport for depature." etc.

This counsel that the *State Forced upon Petitioner*, made all these promises to the jury, and did not fullfill a one of them, viz:

a. he did not present the witnesses for alibi as promised;

b. he did not have the judge read Alibi instructions to the jury;

c. The 3 Alibi witnesses were sequestered to the witness room, awaiting the conclusion of the states evidence;

d. he allowed the prosecution to authorize the excusal of defense alibi witnesses for reasons: their [alibi witnesses] testimony would not be needed until the following day, that the states evidence would take up the remainder of that day;

e. allowed the state to cut short their witness testimony and demand the testimony of defense alibi witnesses [knowing they had been excused]

f. allowed the Judge to deny a continuance for *personal* reasons, instead of *judicial* reasons, without taking measures to protect his client.

This prevented the jury from being presented with live testimony; prevented the Petitioner from putting forth his *alibi* defense. The state forced counsel on Petitioner then forced Petitioner to sit and watch his only means of clearing himself, be *excused* by the state while his counsel did absolutely nothing.

TOM SHANAHAN, THE attorney Petitioner informed the court in his motion to discharge Mr Calbi, that he *desired* to represent him, *would not* have allowed the prosecutor to *interfere* with the defense function by tampering with the alibi witnesses, *Nor* would he have allowed the trial judge to place his personalism before his judicial responsibility to be an impartial referree. Tom states he would have immediately filed a Writ of Prohibition, *immediately argued*, requested proper jury instructions, moved for a mistrial for interfering with the Administration of Justice to name a few.

Had the state not been allowed to *force unwanted counsel* on Petitioner, this miscarriage of Justice would not have happened, and this conviction would not be on Petitioners record. A conviction that Reginald Rhodes has already pled guilty to.

WHEREFORE, Petitioner ask that this court to find that the state did in fact force unwanted counsel on Petitioner, that the Constitution says accused may not be forced to accept unwanted counsel, and that had Tom Shanahan been allowed to represent Petitioner, the results of the trial would have been different and Vacate the judgement and reverse the case for proper proceedings with proper counsel. It is ridiculous to tell a man that he can spend his money to hire a lawyer but may not fire the lawyer that he has hired with his own money, or force unwanted counsel on an accused.

GROUND B.

DENIED IMPARTIAL TRIER OF FACTS

ISSUE:

Petitioner is in custody in violation of the Constitution or laws . . . of the United States, 28 USC § 2254(a), he was *tried before a biased judge*, and therefore is entitled to habeas relief.

RULE:

Structural error, requires automatic reversal, *Chapman*, specifically noted three constitutional errors that could not be categorized as harmless error: (1) using a coerced confession against a defendant in a criminal trial, (2) depriving a defendant of counsel, and (3) *trying a defendant before a biased judge*, [as done in case at bench.]

APPLICATION, CASE AT BENCH:

A. TRIAL JUDGE IMPROPERLY INJECTED HIMSELF INTO THE CASE, RIDICULING DEFENSE COUNSEL TO THE JURY, GIVING THE IMPRESSION HE WAS FOR THE PROSECUTION

B. TRIAL JUDGE IMPROPERLY PLACED HIS PERSONAL PRIVATE INTEREST, BEFORE HIS DUTY TO PLACE JUDICIAL INTEREST OF BEING AN IMPARTIAL REFEREE, IN HIS HARSH DENIAL OF DEFENSE REQUEST FOR CONTINUANCE & PREJUDICED THE PETITIONER.

C. EXPOSED TO OUTSIDE SOURCES, THUS SAT DURING THE TRIAL WITH THE RECOLLECTION THAT REGINALD RHODES HAD BEEN TRIED BY A JURY AND FOUND GUILTY

GROUND B.A

AB INITIO:

From the beginning the trial judge belittled the unwanted counsel, in front of the jury causing them to laugh and disbelieve anything the counsel said viz;

> Trial judge *took over* the questioning of States witness, Willie Sanders, and asked him if he was positive he could identify the defendant [pet'] where-upon the witness testified he was positive the defendant was the driver of the truck [although previously could not I.D. the driver], the trial judge then asked whether or not either lawyer had additional questions, and when defense [unwanted, state forced] counsel responded "I do" the court stated [in a sarcastic manner] "I'LL BET YOU DO" *causing the jury to break into laughter.*

This comment by the judge to defense counsel "I'll bet you do" in response to [his own] the judges question, "Does counsel have any further questions?" was improper and highly inflammatory, misleading and not the way to appear impartial in a *1st degree murder trial.*

The entire conduct of the trial and the first impression on the jury by the trial judge as to whether he appears impartial, obviously affects both the verdict and how the jury will view the evidence presented by both state and defense. Without the protection of a fair referee, who is to call a foul when a fould blow is made by the prosecution such as incase at bench, the excusing of alibi witnesses, thus stripping Petitioner of a defense. If the judge is laughing at the defense and causing the jury to laugh how can the rest of the trial be fair.

GROUND B.B

TRIAL JUDGE PLACED HIS PERSONALISM BEFORE HIS JUDICIALISM IN HARSH DENIAL OF REQUEST FOR CONTINUANCE

ISSUE:

Reasons trial court gave for the denial of continuance were PERSONAL, stating: "[M]y daughter is going to be in the hospital all day . . . So I've got to stay with her . . . its's too bad. The Court will not [Tr *580] be able to be here tomorrow to try the case." Overruling the motion for continuance the court then submitted the case to the jury *WITHOUT ALIBI INSTRUCTIONS* and more troubling, without the testimony of alibi witnesses, Laura Lee, Gladys and James D. Edwards.

The reason the continuance was requested is because:

1. the defense was alibi; [as previously stated herein
2. the alibi witnesses were under subpeona for the defense, had been present in the courthouse that morning, left around lunch time, under the direction that their testimony would not be needed until the following day. [Tr. 571-77]
3. It is obvious after driving from California at their own expense, they were willing to testify.

RULE:

Flynt, 756 F2d 1352, 1358, Petitioner must show at *minimum*, he suffered prejudice. In determining whether trial court abused its discretion in denial of continuance, Federal Courts analyze the following factors: (i) extent of defendants diligence in readying his defense prior to date set for hearing, (ii) likelihood that continuance would serve a useful purpose, (iii) whether the continuance would

inconvenience the parties, the court or other witnesses, (iv) the critical question is whether defendant was prejudiced by the courts refusal to grant his request for continuance.

APPLICATION, CASE AT BENCH:

(i) DILIGENCE:

Case at bench, the need for continuance was not due to defendants lack of diligence but rather, to the prosecutorial misconduct, claiming it would take the remainder of that day to present its case and state witnesses, [attached as Petitioners *Ex. BB*] STATES RESPONSE TO RESPONSE TO REQUEST FOR DISCOVERY, in pertinent part, [**1-3], which shows a witness list of (23) twenty-three state witnesses, which *understandably* would take up the rest of the day, . . . HOWEVER, the prosecutor instructed an officer to excuse the alibi witnesses who were sequestered in the witness room, giving the reason that their alibi testimony would not be needed until the following day.

After the alibi witnesses, followed instructions and left [not imagining someone would interfer with the administration of justice by misleading them [the alibi witnesses] into leaving without testifying, after driving 1,000 miles and spending $1,000. dollars of their own time and money.

The state then *cut short* their witness list and witness testimony, thus placing the defense in position to present testimony that was absent. Instead of the referee [trial judge] calling *foul*, and granting a continuance as judicial duty to protect the accused right to put forth a defense, compulsory process for obtaining witness, the DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL TRIAL, the court was suppose to be the guardian of those rights in its own forum.

(ii) USEFULNESS:

The continuance would have allowed the alibi witnesses the consideration they deserved after traveling a thousand miles to testify, by allowing them to do just that TESTIFY. It would have allowed the Petitioner the right to put forth a defense of *alibi* as defense counsel promised the jury. It is most likely that a *reasonable* and properly instructed jury would have found Petitioner not guilty, inlight of the weakness of the states case.

The live testimony, would have shown that Petitioner was not even in town, combined with the testimony of Reginald Rhodes [who already pled guilty] also clearing Petitioner of any involvement. The alibi witnesses could account for Petitioners whereabouts on the day in question.

U.S. v POPE, 841 F2d 954, 957, and *Flynt*, requires showing relevence of the missing testimony, and that nothing more should be required, to demonstrate usefulness of continuance. *Case at bench*, the continuance would indisputably have served a useful purpose, the promised *alibi defense & alibi witnesses*.

(iii) INCONVENIENCE:

The only complaint of inconvenience came from the referee [trial judge] himself. That his PARENTAL responsibility comes before his JUDICIAL responsibility. *With all respect*, the daughter of trial judge was to be hospitalized all day the next DAY, however, Petitioner is sentenced to be CONFINED ali his life because the judge chose not to be impartial, no matter what reason or excuse was given, a *miscarriage of justice_has occurred*. The judge did not take under consideration the inconvenience of the alibi witnesses taking out their time to travel from Ventura . . . . California, to do their Civic Duty and testify.

The trial judge could have, attempted to find another judge to preside over the remainder of Petitioners trial, while he [the trial judge] was visiting with his daughter at the hospital. His judicial duty were equally compelling after all he took an oath, not to be breached lightly, especially at the sacrifice of rights he is suppose to protect.

At minimum, the trial judge should have granted the continuance for a few hours, and investigating the prosecutorial misconduct. [It doesn't make sense for the witnesses to travel so far and then . . . not be allowed to testify]. This Abuse of discretion, and reasons were strictly personal on the part of the judge, to the prejudice of Petitioner.

(iv) PREJUDICE:

The most critical question, whether Petitioner was prejudiced by trial courts refusal to grant continuance. The prejudice in case at bench, is obvious by the guilty verdict and excessive sentence by a trial without fundamental fairness. The denial of continuance prevented [pet'] from the right to put forward his *alibi defense*, In *U.S. v Pope*, court held: "DEFENDANT WAS PREJUDICED WHERE denial of brief continuance prevented him from introducing "the *only* testimony that could *plausibly* have helped him."

U.S. v 2.61 Acres of Land, 791 F2d 666, 671, finding prejudice where denial of continuance *prevented* defendant from introducing *any evidence* on its behalf. *Armant v Marquez*, 772 F2d 552, found prejudice where denial of continuance effectively denied defendant the opprotunity to prepare his own defense.

Case at bench, provides a more than persuasive explanation of how the denial of continuance adversely affected him, the defense was alibi and the denial of continuance STRIPPED HIM OF THAT DEFENSE inter alia. So given the importance of the alibi witnesses that were not allowed

to testify, and particularly the fact the outcome turned to the credibility of state witnesses, who were inconsistent in there ability to identify the driver of the truck [if in fact there ever was a driver], faliure of the court to grant continuance to allow alibi witnesses, to impeach state witnesses, and prove the innocence of petitioner. The trial court in essence denied [pet'] Due process right to a fair trial in front of an IMPARTIAL TRIER OF FACT.

CONCLUSION:

Clearly, it can be drawn that the petitioner was DENIED IMPARTIAL TRIER OF FACTS. The only way for [pet'] to prevail was to convince the jury that the states version was untruthful, that perhaps ulterior motives existed. That in fact he was not present, because the continuance was denied, the jury was compelled to make a decision without hearing the testimony of critical alibi witnesses.

Consequently, the [pet'] was deprived of the process to which he was entitled, a process designed to safeguard his interest and ensure a fair trial & proper result. Because the testimony of *key* witnesses were involved, the deprivation was substantial and under these circumstances, the prejudice requirement set forth in *Flynt*, and other relevant cases is met. *See Martel*, 56 F3d 993 (1995).

U. S. v Meija, 69 F3d 309 [footnote 11], Where denial of continuance directly affects a defenants ability to present evidence, we do not require "the clearest showing of actual and substantial prejudice"

This denial in the *case at bench*, amounted to A CONVICTION AFTER PROCEEDING IN WHICH NO JUDICIAL DISCRETION WAS EXERCISED, and constitutes Structural Error, and is not subject to harmless error analysis, *Riley v Deeds*, 56 F3d 1117.

WHEREFORE, Petitioner respectfully ask this court to reverse his unlawful conviction and sentence and remand the case at bench for a trial as guaranteed by the Due Process Clause of the United States Constitution.

GROUND B.C

JUDGE EXPOSED TO OUTSIDE SOURCES

EVIDENCE ALLIUNDE:

As evidenced by the trial judge's own statement on record at sentencing [supra Ex. A.1] THE COURT: "Mr. McMullin, my recollection of it is that Rhodes was tried by a jury and was found guilty, is that correct?"

It is very possible, the trial judge being in this state of mind, sitting as trier of, disbelieved the petitioner's version that Mr. Rhodes was willing to come and testify to the truth, being Petitioner had nothing to do with the shooting of Mr Shelby and that he [meaning] Mr Rhodes in fact had pled guilty to the shooting. The trial judge may further have thought a continuance would be a waste of time, since he was under the impression that the claims of [Pet'] that Mr. Rhodes *pled guilty* was a LIE!

Further, without being in an *impartial* state of mind, denied the continuance for the alibi witnesses, being already convinced that you only have to prove a person a lier once. And he proved petitioner a lier, when petitioner claimed Mr. Rhodes pled guilty, when the trial judge [from extrajudicial sources] was under the impresssion Mr. Rhodes went to *jury trial*, if that be true then that would make petitioner a lier.

CONCLUSION:

It can clearly be concluded that: (1) the judges impartiality is questionable; (2) that impartiality was affected by the understanding he [trial judge] obtained from outside sources, and (3) it had effect on his decision to grant or deny the continuance. Had the judge not already been under the impression that [Pet'] was a lier, it is most likely that he would have granted the continuance and protected the right to put forth a defense

as promised by the counsel that the *state forced upon petitioner to begin with*, the defense of alibi, with the witnesses that traveled all the way from California.

WHEREFORE. Petitioner asks that his case be remanded before a different judge for proper proceedings. Because the previous judge Abused his discretion for the reasons herein stated and denied his due process rights to a fair trial, before an impartial trier of facts. Before a judge who's state of mind is not preconceived by a false recollection of facts that did not occur.

GROUND C.

PROSECUTORIAL MISCONDUCT

Petitioner asserts that the herein acts of prosecutorial conduct, so infected the entire trial process as to render his trial fundamentally unfair. That claims of prosecutorial misconduct are cognizable in federal habeas corpus review. The Specific acts complained of are as follows:

CLOSING ARGUMENT:

[*619-20, Tr] prosecutor tells the jury, "That last little speech that Mr McMullin [def' counsel] made, about this being the weakest case he's seen in his 40 years of experience, *he said that in the last case I tried with him too*."

In other words, the prosecutor was telling the jury that defense counsel is trying to FOOL them, the prosecutor accused defense counsel of FOOLIN the jury. [that in itself is reversible error] Defense counsel responded that he didn't even remember ever trying another case with the prosecutor in the case at bench. [so who was foolin who] clear prosecutorial misconduct placing the minds of the jury on the defense against defense counsel who already was made a laughing joke by the trial judges

sarcastic remark Ab Initio [supra]. Further, the jury looked at the defense counsel as a lier promising to put forth an alibi defense along with *alibi witnesses*. So the misconduct of the prosecutor telling the jury that defense counsel was only trying to fool them with a line she heard before in a previous trial, did without question *taint* the jury's mind even more.

and

[Tr *624], the prosecutor argued to the jury that [pet'] "NO DOUBT" was in town on August 26 & 27, 1992, based on the *lack of alibi testimony*.

The prosecutor took advantage of a situation that was created by misconduct of the prosecutor in the first place, designed to intentionally strip the [pet'] of a defense, viz:

OBSTRUCTION OF JUSTICE:

1. Detective Garry Wantland, interviewed the defense Alibi Witnesses on the 1st day of trial at the instructions of the prosecutor, to learn what the trial testimony would be, [Tr **573-82].

2. After learning their testimony would put a hole in the states case, the prosecutor pulled a joker out of the deck. She first submitted a witness list of 23 witnesses for the state, indicated that the state's case would take up the remainder of the day.

3. Authorized the excusal of defense witnesses from sequestered witness room. Then cut her case short. Although she did not object to the request for continuance by defense. Her job was to SEEK JUSTICE, THE TRUTH.

Clearly, shw should have wanted the witnesses to testify, to make sure she was not convicting the wrong person.

CONCLUSION:

It can be concluded that the prosecutor in this case was not after justice, was not seeking the truth, or functioning under the dual powers of the prosecution to make sure the proceeding was a fair one, for the petitioner. The misconduct shows a pattern that raises questions. Why would she tell the jury that defense counsel was trying to fool them. Why would she indicate to the jury that she tried a case with defense counsel before & he used the same line, when she knew all the time she never tried a case with the defense counsel. And Why would she have the alibi witnesses to leave before testifying knowing that the defense counsel was tied up in trial, finally why would she allow the judge to sit through . . . an entire trial that she [prosecutor] had no intentions of being a fair trial. She knew all along that the alibi was not going to be presented, she needs to be taught the difference between a *hard blow* and a *foul blow*.

WHEREFORE, petitioner ask this court to inform her that foul blows will result in a reversal of her wrongful convictions, thus ask this court to reverse for the claim of prosecutorial misconduct.

GROUND D.

INSUFFICIENCY OF EVIDENCE

Petitioner acknowledges that his trial counsel preserved and attacked that there was insufficient evidence, as well as his post conviction 29.15 counsel and also his first direct appeal counsel stated there was insufficient evidence to convict, and petitioner will include these documents in his traverse.

However, petitioner wants the courts to know that his appellate counsel failed to argue on appeal the federal constitutional standard for insufficient evidence.

GROUND E.

IMPROPER SENTENCE

Petitioner wishes to bring to the courts attention that he will prove his innocence nevertheless, he wishes the court to know that if he was allegedly found guilty and sentenced as aider & abetter, then why did the alleged principal receive less time. Petitioner asserts that the sentences should have at minimum been the same.

GROUND F.

EXCLUSION OF EVIDENCE

Petitioner contends that the trial court violated his right to due process, when it precluded him from presenting any testimony from his alibi witnesses, by the denial of continuance and this prevented him from putting forth a defense [th]at was promised to the jury. This denied petitioner a fair trial, because the testimony would have shown the jury that he was not in town.

2ndly,

Trial court precluded him from presenting to the jury the testimony of Reginald Rhodes, who already pled guilty to the offens and this denied petitioner a fair trial and due process.

GROUND G.

DENIED FAIR TRIAL

Petitioner asserts, that the cumulative and combined effect of the above errors rendered his trial fundamentally unfair in violation of his due process rights as guaranteed under the 14th Amendment.

CONCLUSION:

Petitioner contends that the combined & cumulative effect of the stated claims: State forced counsel on accused; Denied impartial trier of facts; prosecutorial misconduct; Insufficiency of evidence; Improper sentence; Exclusion of evidence; and a fundamentally unfair trial overall, sufficiently states a claim for habeas review.

Respectfully submitted,

/s/ Remon Lee
REMON LEE

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

ground A, forced counsel was not raised because the appellate counsel failed to raise it. Ground C, because the appellate counsel failed to raise it. ground E. because the appellate counsel failed to rainse it.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes [ ] No [x]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing n/a

(b) At arraignment and plea Robert Calbi, 912 Baltimore, Suite 400, KCMo

(c) At trial James McMullin, 1125 Grand Ave, suite 610, KCMo 64106

(d) At sentencing James McMullin (supra)

(e) On appeal Susan Hogan (P.D. office) KCMO

(f) In any post-conviction proceeding Susan Hogan (supra)

(g) On appeal from any adverse ruling in a post-conviction proceeding. Susan Hogan (supra)

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time? Yes [ ] No [x]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes [ ] No [x]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing any petition attacking the judgment which imposed the sentence to be served in the future? Yes [ ] No [ ]

Wherefore, petitioner prays that the Court grant petitioner relief to which petitioner may be entitled in this proceeding.

_____
Signature of attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 12-30-97
(date)

/s/ Remon Lee
REMON LEE
Signature of Petitioner

/s/ Daniel J. Greene
Daniel J. Greene
Notary Public/Notary Seal
State of Missouri
County of Illegible
My Commission Expires 3/27/2000

IN THE
UNITED STATES DISTRICI' COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

98-0074-CV-W-8-P

REMON LEE,

Petitioner,

VS.

MIKE KEMNA,

Respondent.

AFFIDAVIT AND STORY OF PETITIONER

I REMON LEE, being truly sworn, states under oath as follows:

1. My name is Remon Lee. I am over 21 yrs of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At alltimes pertinent hereto, I am the Petitioner in the case at bench, and my personal account of events goes as follows:

I was incarcerated in prison from 1988 until 1991; at which time I was paroled to Kansas City, Missouri.

Around May of 1992, I caught an assault case in Kansas City. The first part of June 1992 my parole officer put a warrant out for my arrest.

I could not give my parole officer any type of explanation, it was back to the joint, period. My Parole officer new I was under pressure from, being placed back into the same environment.

I repeatedly, expressed to my Parole officer that I wanted to visit my mother in California, since I hadn't seen her since 1988. I was told that I would be given a travel permit, although this never seemed to happen.

So, after I caught the assault case, I said to myself, I might as well go and see my mother and spend the Holliday & family gathering with the family before going back to prison. So I went to California & spent the birthday reunions and Holloween with my mother & family in California.

I Then said I'll spend Thanksgiving & Christmas with my Woman, before dealing with the parole violation. And I did this, with the exception of Christmas, because I was arrested at my Womans house the day after Thanksgiving. The assault case was in no way connected with the shooting death of Mr Shelby.

The testimony of my family, who did travel from California, coupled with the testimony of Reginal Rhodes, would have informed the jury of this and cleared me of these charges, if the Judge & the prosecutor would have allowed them to testify.

I, Remon Lee, hereby certify that the above facts are true & correct, pursuant to 28 *USC § 1746*, Federal Rules of Evidence, Rule *1004(3)*.

Executed on:
December 30 , 1997

Signature: /s/ Remon Lee
REMON LEE

[Filed Feb 20, 1998]

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 980074-CV-W-8-P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

MOTION TO INCLUDE DOCUMENTS

COMES NOW, Remon Lee, Petitioner, Proper Person, and motions this court to include the following documents:

1. Affidavit of Reginald Rhodes: *Exhibit #1*

   This affidavit supports [Pet's], contention that, contrary to the trial courts state of mind, Mr. Rhodes did in fact plead guilty to the death of Mr. Shelby; was willing to testify and Clear [Pet's] name of any involvement. That [Pet'] is innocent of these charges; *inter alia*.

2. Affidavit of Laura Lee: *Exhibit #2*

   This affidavit supports [Pet's], contention that: his witnesses did not abandon him; that they left the courthouse on instructions; that [Pet'] was in fact in California, and did have an alibi defense, *inter alia*.

3. Affidavit of Gladys Edwards: *Exhibit #3*

   This affidavit supports [Pet's], contention that: his witnesses did not abandon him; that [she] also left the courthouse along with the other *alibi witnesses*, after

being instructed their testimony would not be needed until the following day; further that [Pet'], was in fact in California at the time in question, *inter alia*.

4. Affidavit of Minister James Edwards: *Exhibit #4*

   This affidavit supports [Pet's] con'ention that: his witnesses did not abandon him, but in fact left the courthouse after being instructed that their testimony would not be needed until the following day. That this witness along with the other *alibi witnesses* picked [pet'] up from the airport in California, and that [Pet'] was in California at the time in question. Pet' did have an alibi defense, *inter alia*.

5. *Exhibit A.1*- [**13-14] of the trial transcript: THE COURTS state of mind that Mr. Rhodes pled guilty, contrary to the record and the aff' of Mr. Rhodes attached as *Ex. #1*; and that [Pet'] told the court & his lawyer Mr. Rhodes was willing to testify;

6. *Exhibit A.2- [**114-115, &**122-123]*, which state in essence: trial attorney told the jury the defense will be alibi, the judge *will instruct on alibi*., the alibi witnesses will be Gladys Edwards, Laura Lee, & Minister James Edwards.

7. *Exhibit A.3*,- [**193-197], of trial transcript that states in essence: trial attorney told the jury what the testimony of the *alibi witnesses* would be, which is exactly whats on the herein affidavits. The court and state knew this because they gave a statement to the Detective on instructions from the state. (See Ex. 1-3 herein).

8. *Exhibit B.B*,- States Response to Request for Discovery, three (3) pages, this shows the *witness list of the states*, and from the list its easy to see that the trial would take longer in support of the states claim. Nevertheless, after excusing the *alibi* witnesses, the

state cut their witnesses short and did not present the testimony of all the witnesses on the list.

Petitioner, has previously referred to these documents in his pleadings and has previously alerted the court and respondent that the herein documents would be sent in a motion to include documents: for CLARIFICATION PURPOSES, for reasons stated in this and previously filed 2254.

WHEREFORE, Petitioner asks this court to accept his motion to include documents along with the attached documents.

Respectfully submitted,

/s/ Remon Lee
REMON LEE
Petitioner/Proper person

CERTIFICATE OF SERVICE:

I Remon Lee, cerify that a copy of the foregoing was mailed postage prepaid to respondent/Missouri Attorney General Office this____day of February 1998.

/s/ Remon Lee
REMON LEE

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-8-P

REMON LEE,
Petitioner,

VS

MIKE KEMNA,
Respondent.

AFFIDAVIT OF REGINALD RHODES

Reginald Rhodes, being truly sworn, states under oath as follows:

1. My name is Reginald Rhodes. I am over 21 years of age, and am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was charged with the death of STEVE SHELBY: that occurred on or about August 27, 1992, and have personal knowledge to the events concerning the death of Mr. Shelby and the conviction of REMON LEE, [in question].

3. I Reginald Rhodes was identified as the shooter [principal], by an eyewitness. I pled guilty to the shooting death of Mr Shelby, as the *lone shooter*. I was willing to testify at the evidentiary hearing and the trial of Mr Remon Lee, that:

> He was not present, nor involved in the shooting death of Mr Steve Shelby. I was told by the prosecutors office that they wanted Remon Lee, and did not care if he was involved or not.

4. I was told by my attorney that Remon Lee had witnesses to prove his where-abouts on the day and time in question. However, Remon Lee wound up getting maliciously prosecuted for a crime he was *not involved in*. He even got more time than I [Reginal Rhodes got].

5. I wish to set the record straight, and testify that Remon Lee is innocent.

I, Reginald Rhodes, hereby certify that the above facts are true and correct, I have not been coerced in any way, and I am signing this under my own free will.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to before me this 15 day of January, 1998.

/s/ Reginald Rhodes
REGINALD RHODES 500710
Jefferson City Correctional Center
P.O. Box 900
Jefferson City, Mo. 65102

/s/ Michael Thompson
Notary Public

Dated: 1-15-98

EXHIBIT 2

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 980074-CV-W-8-P

REMON LEE,
Petitioner,
vs.
MIKE KEMNA,
Respondent.

AFFIDAVIT OF LAURA LEE

I LAURA LEE, being truly sworn, states under oath as follows:

1. My name is Laura Lee. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge. At all time pertinent hereto, I was a resident of California, until recently, I moved to Dallas, Texas with my parents.

2. I know for a fact that Remon didn't have anything to do with shooting anyone on August of 1992, because Remon was in California, we hadn't seen him in so long that when he came to see us we didn't want him to leave, cause it wasn't no telling when we would see him again. I know he got to California in July for all the birthday parties we celebrate together including his own. We all picked him up from the airport cause we were all so happy to see him. I begged Remon to stay for the Holloween party in 1992. So I know he was in California from July 1992 until October 1992 because it was *my house* he was staying at. So I knew personally

when he came and left. We went all the way to Missouri to testify, they took statements from us and everything. Then those people in Missouri told us we could leave because OUR TESTIMONY would not be needed until the next day. Then they went on without US. Had Us travel all that way for nothing. It ain't right. Remon might have done some things but he ain't guilty of no crime in August of 1992.

I, Laura Lee, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 5th day of February, 1998.

/s/ Laura Lee
LAURA LEE

/s/ Norma Jean Burkins
Notary Public

Dated: February 5, 1998

EXHIBIT 3

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 98-0074-CV-W-8-P

REMON LEE,
Petitioner,

vs.

MIKE KEMNA,
Respondent.

AFFIDAVIT OF GLADYS EDWARDS

I GLADYS EDWARDS, being truly sworn, states under oath as follows:

1. My name is Gladys Edwards. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.
2. At all times pertinent hereto, I was a resident of and at: 1521 Joanne Ct., Oxnard, California, 93030-3428. The pertinent time in question being, July until October of 1992. [Oxnard, referred to as Ventura].
3. The other pertinent part being February of 1994. My personal knowledge as follows:

   1st, 1 have never had any exposure to any of my sons past court dealings. I know my boy has had trouble with the law in the past, although I'm not certain what the exact nature of that trouble has been, other than he went to prison.

   2nd, In 1992, I know my boy was released from prison and he promised he would come to see Me

[his mother], by his birthday which is July around the same time as two (2) other family members. So we usually hold a family reunion to celebrate the combined birthdays. I say usually meaning my son has been absent from the past few, due to his confinement. In *July 1992*, my son Remon Lee, kept his promise to make it to California for the Reunions, I was present when Remon was picked up from the airport in California, *July of 1992*. I further know that he was in California, all the way to *October 1992*, because we begged him to stay for Holloween.

3rd, When I heard the boy was in trouble, that he was accused of committing a crime August of 1992. I knew in my mind *this time*, the accusation was false because the boy [meaning Remon Lee, Petitioner] was in California with the family. So although I never involved myself in his court affairs in the past. My husband, daughter, and myself *traveled* from California, all the way to Kansas City, Missouri. For the *purpose of testifying at the trial of Remon*. So the people would know THE TRUTH. The boy was not involved this time. He was in California and we could vouch for him.

Finally, while we [meaning: myself, husband & daughter] were at the courthouse in Kansas City, Mo. a man who identified himself as an officer, told us that the *Judge* and *prosecutor* needs him to take a statement from us so they will know what our testimony will be and so there will be a record of our statements. So we gave a statement.

Another officer of the court told us that we will not be allowed to sit in the court-room whild the trial is going on because we are to testify and can't hear what the other witnesses are saying. So we had to remain in separate room. The officer of the court was

allfull nice. He would check on us to see if We needed anything, coffee, restroom; At one point while we were back and forth to the courthouse, it seems like the 3rd day. While we were in the separate room, the officer of the court came and told us that the prosecutor stated that the states case will again take up the remainder of that day. That Our testimony will not be needed until the following day, that we could leave until the following day. He [the court officer] told Us not to worry, the Judge knows *We came to testify*, they have Our statements, and the trial will not be over until we testify. So at those instructions we left. Later we found out, they went on without Us and finished the trial early, so We didn't know what to do after traveling all that way at our own expense, then not being allowed to do what we came to do.

I, Gladys Edwards, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 5th day of February, 1998.

/s/ Gladys Edwards
GLADYS EDWARDS
7418 Woodspan Dr.
Dallas, Texas 75232

/s/ Norma Jean Burkins
Notary Public

Dated: February 5, 1998

EXHIBIT 4

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 98-0074-CV-W-8-P

REMON LEE,

Petitioner,

vs

MIKE KEMNA,

Respondent.

AFFIDAVIT OF MINISTER JAMES EDWARDS

I MINISTER JAMES EDWARDS, being truly sworn, states under oath as follows:

1. My name is James Edwards. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was and still is a Minister. I was a resident in California, in 1992 and 1994. I have recently moved to Dallas, Texas. My present address is: 7418 Woodspan Dr., Dallas, Texas 75232.

3. In February of 1994 my wife and I along with daughter, traveled to Kansas City, Mo. to testify at the trial of my wife's son [Remon Lee]. I gave a statement to a police officer with the Kansas City, police department that, Remon Lee was in California from July until October of 1992. I know this because I was the driver of the car that picked the boy up from the airport in California, and was the driver that took the boy back to the airport when he left

California. I was willing to testify to this and this is why we traveled from California for the trial. Further, it is True that while at the Courthouse, we were told by an officer of the court that Our testimony would not be needed until the following day, we were excused until then. We *did not travel from California to abandon the boy*, we came to testify.

I, Minister James Edwards, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 9th day of February, 1998.

/s/ James Edwards
JAMES EDWARDS

/s/ Norma Jean Burkins
Notary Public

Dated: February 9, 1998

Petitioner Exhibit B.B.

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Docket: A
Division No. 11
No. CR93-0453

STATE OF MISSOURI,
Plaintiff,

vs.

REMON LEE,
Defendent.

STATE'S RESPONSE TO REQUEST FOR DISCOVERY

COMES NOW the State of Missouri, by and through Assistant Prosecuting Attorney Linda Koch-Carroll, and makes the following responses to the defendant's Request For Discovery:

1. Witnesses

Reggie Williams
5047 Park
Kansas City, Missouri

Will R. Sanders
5015 Olive
Kansas City, Missouri

Anthony Anderson
6815 Monroe
Kansas City, Missouri

Eric Shelby
3010 East 61st Street
Kansas City, Missouri

Connie Wooten
5446 Swope Parkway
Kansas City, Missouri

Rhonda Shelby
6621 Askew
Kansas City, Missouri

C. Anderson
7108 Bales
Kansas City, Missouri

David Haynes
2245 East 68th Street
Kansas City, Missouri

Kathy Riley
1632 East 22nd Street
Kansas City, Missouri

Terrance Collins
3864 East 59th Terrace
Kansas City, Missouri

James Payton
Kansas City Police Department

Detective Gary Buchanan
Crime Scene Investigations Unit
Kansas City Police Department

Detective Frank Brumfield
Crime Scene Investigations Unit
Kansas City Police Department

CSI Ron Payne
Crime Scene Investigations Unit
Kansas City Police Department

Detective Gary Habelitz
Crime Scene Investigations Unit
Kansas City Police Department

Detective Joe Dresselhaus
Crime Scene Investigations Unit
Kansas City Police Department

Detective Rick Pilgrim
Homicide Unit
Kansas City Police Department

Detective Chris Jefferson
Homicide Unit
Kansas City Police Department

Detective J. Crayon
Homicide Unit
Kansas City Police Department

Detective G. Wantland
Homicide Unit
Kansas City Police Department

Detective R. Hurtman
Homicide Unit
Kansas City Police Department

Detective Acklin
Homicide Unit
Kansas City Police Department

Detective Al DeValkenaere
Homicide Unit
Kansas City Police Department

2. Statements of the Defendant

There are no statements of the defendant other than those contained in the police reports.

3. Grand Jury Proceedings

There are no existing transcripts of any Grand Jury proceedings related to this offense.

4. Preliminary Hearing Transcript

There is no existing transcript of the Preliminary Hearing.

5. Experts

The State at this time intends to use the expert testimony in the trial of this case of the following:

Dr. Overman, Jackson County Medical Examiner's Office;

Karen Smith, Fingerprint Identification Unit; and

Ballistics expert from the Regional Criminalistics Laboratory.

[Filed Feb. 24, 1998]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-8-P

REMON LEE,
Petitioner,

vs.

MIKE KEMNA,
Respondent.

ORDER GRANTING PETITIONER'S MOTION
TO INCLUDE DOCUMENTS

It is ORDERED that petitioner's motion to include documents (Doc. No. 6) is granted insofar that the documents petitioner has attached thereto are filed as petitioner's exhibits in this proceeding.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
United States District Judge

Kansas City, Missouri,
Dated: FEB 24 1998

[Filed Mar. 11, 1998]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 98-0074-CV-W-8-P

REMON LEE,
Petitioner,

vs.

MIKE KEMNA,
Respondent.

RESPONSE TO ORDER TO SHOW CAUSE WHY
PETITIONER'S PETITION FOR WRIT OF HABEAS
CORPUS SHOULD NOT BE GRANTED

Comes now respondent, by and through counsel, and states as follows in response to this Court's order to show cause why a writ of habeas corpus should not be granted.

Statement of Custody and Parties

Named petitioner, Remon Lee, is currently incarcerated in the Crossroads Correctional Center, located at Cameron, Missouri, pursuant to the judgment and sentence of the Circuit Court of Jackson County, Missouri. Petitioner was convicted of first degree murder, § 565.020, RSMo 1994 and armed criminal action, § 571.015, RSMo 1994, and was sentenced to life imprisonment without the possibility of parole and ten years imprisonment with the terms of imprisonment to be served concurrently. Named respondent, Mike Kemna, Superintendent of the Crossroads Correctional Center, is petitioner's current custodian and thus is a proper party respondent. 28 U.S.C. § 2254, Rule 2(a).

Statement of Exhibits

1. Attached hereto is a true and correct copy of Volume 1 of the trial transcript; said volume is incorporated by reference herein, and identified as Respondent's Exhibit 1.

2. Attached hereto is a true and correct copy of Volume 2 of the trial transcript; said volume is incorporated by reference herein, and identified as Respondent's Exhibit 2.

3. Attached hereto is a true and correct copy of Volume 3 of the trial transcript; said volume is incorporated by reference herein, and identified as Respondent's Exhibit 3.

4. Attached hereto is a true and correct copy of the transcript of the new trial motion and sentencing hearing; said transcript is incorporated by reference herein, and identified as Respondent's Exhibit 4.

5. Attached hereto is a true and correct copy of the trial legal file; said trial legal file is incorporated by reference herein, and identified as Respondent's Exhibit 5.

6. Attached hereto is a true and correct copy of the post-conviction review legal file; said post-conviction review legal file is incorporated by reference herein, and identified as Respondent's Exhibit 6.

7. Attached hereto is a true and correct copy of the petitioner's consolidated appellate brief; said brief is incorporated by reference herein, and identified as Respondent's Exhibit 7.

8. Attached hereto is a true and correct copy of the state's appellate brief; said brief is incorporated by reference herein, and identified as Respondent's Exhibit 8.

9. Attached hereto is a true and correct copy of the order and memorandum of the Missouri Court of Appeals affirming petitioner's conviction and sentence and the denial of his post-conviction relief motion; said order and memorandum are incorporated by reference herein, and identified as Respondent's Exhibit 9.

Statement of Issues and Exhaustion

Petitioner raises the following grounds for relief:

1. Petitioner was forced against his will to accept as his appointed attorney an attorney not of his choosing.

2. The trial judge was biased against petitioner.

3. The prosecutor committed misconduct through tricking all petitioner's alibi witnesses into not testifying and by making improper closing argument.

4. The evidence was insufficient to support petitioner's conviction.

5. Petitioner's sentence is improper because he received more time than his accomplice.

6. The trial court violated petitioner's right to due process of law by not granting him a continuance to locate alibi witnesses who left the courthouse during trial without testifying.

7. The cumulative prejudice of all the errors alleged by petitioner rises to the level of a due process violation.

The only claims petitioner raised in his consolidated appeal were that the trial court erred in denying a continuance, that trial counsel was ineffective for not calling petitioner's accomplice Reginald Rhodes and that trial counsel was necessarily ineffective after petitioner's alibi witnesses left without testifying because no counsel could be effective under those circumstances (Resp.Exh. 7 at 7, 9).

All petitioner's grounds are exhausted either through presentation to the Missouri courts or procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 733 (1991).

Analysis

GROUND 1: Petitioner alleges he was forced against his will to accept an appointed attorney not of his own choosing and

this violated the United States Constitution since he wished to *retain* a different attorney.

This claim is not in petitioner's new trial motion (Resp.Exh. 5, 47-52). It is not in either the *pro se* or amended post-conviction relief motions [1] (Resp.Exh. 6, 1-10, 20-29). The claim was thus defaulted. The claim was again defaulted when it was not raised in petitioner's consolidated appellate brief (Resp.Exh. 8). Petitioner's ground is procedurally barred from review. *See Reese v. Delo*, 94 F.3d 1177, 1185 (8th Cir. 1996), *cert. denied* 117 S.Ct. 2421 (1994).

Petitioner's ground is also meritless. Petitioner was represented at trial by Mr. James McMullin. Petitioner's previous attorney Mr. Robert Calibi had withdrawn from the case because he was unable to get along with petitioner (Resp.Exh. 3 at 495). Petitioner has no constitutional right to have an endless parade of lawyers appointed to represent him delaying the trial indefinitely. Additionally, at the end of trial the petitioner was questioned about the representation provided by Mr. McMullin (Resp.Exh. 4 at 8-19). Petitioner mentioned nothing about having money to retain a different attorney but nevertheless having McMullin forced on him. Rather, petitioner told the court concerning Mr. McMullin "I think he did a wonderful job" *(Id.* at 11). Also petitioner was represented on appeal by the public defender and apparently contemplated being so represented at the time of trial *(Id.* at 17, requesting the trial court provide the judgment as quickly as possible so it could be sent to the public defender to file a notice of appeal). In fact petitioner filed a motion stating he was indigent and requesting the appointment of the office of the public defender to represent him in the post-conviction

[1] If petitioner were using a trial error legal theory, the claim should have been in a new trial motion. If he were using an ineffective assistance of counsel theory, the claim should have been in a post-conviction relief motion.

process (Resp.Exh. 6 at 11). He was represented by the public defender in the post-conviction process and on appeal (Resp.Exh. 6 at Resp.Exh. 7). Petitioner's claim is thus inconsistent with the record of his case and meritless.[2]

GROUND 2: Petitioner alleges the trial judge was biased against him. This claim is not in petitioner's new trial motion or his consolidated appellate brief (Resp.Exh. 5 at 47-52; Resp.Exh. 6). The ground is procedurally barred from review. Missouri Supreme Court Rule 29.11; *Reese v. Delo*, 94 F.3d at 1185.

Petitioner's claim of judicial bias is based on three specific instances of conduct that are allegedly evidence of bias. The court questioned a state's witness after He was cross-examined by the defense and said "I bet you do" when defense counsel stated he had a few more questions (*See* Resp.Exh. 2 at 413-415).[3] The trial judge denied a continuance requested by petitioner after petitioner's alibi witnesses left the courthouse during trial. The trial court mistakenly believed petitioner's codefendant had gone to trial and been convicted when he had actually pled guilty. Were petitioner's ground not barred, it would necessarily fail as meritless. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (noting that allegations of personal bias or prejudice against a party have been held insufficient to raise a due

[2] Insofar as petitioner may be attempting to allege that trial counsel was ineffective for not calling Reginald Rhodes, the claim is meritless for the reason set out by the Missouri Court of Appeals (Resp.Exh. 9 at 6-8). As far as petitioner may be alleging counsel was ineffective for not calling alibi witnesses, the claim is also meritless for the reasons set out by the Missouri Court of Appeals (Resp.Exh. 9 at 8-9).

[3] The "I'll bet you do comment" itself was alleged to be trial error in the new trial motion but the claim was abandoned on appeal. Were petitioner trying to raise that trial error claim as an independent claim or trial error, his claim would be barred for that reason. However, petitioner appears to be raising the comment only as evidence of alleged bias.

process claim, and if a case exists that would implicate the due process clause, it would occur "only in the most extreme of cases"). Petitioner's claims do not show any bias at all and certainly his is not the "most extreme of cases."

GROUND 3: Petitioner alleges the prosecutor committed misconduct by tricking petitioner's alibi witnesses into leaving, rushing her case to a close, then commenting to the jury on the absence of the alibi witnesses. Petitioner's claim is procedurally barred from review since it was not presented in petitioner's motion for new trial or his consolidated appellate brief (Resp.Exh. 5 at 47-52; Resp.Exh. 7). *Reese v. Delo,* 94 F.3d at 1185. Petitioner also alleges the prosecutor committed reversible misconduct when after defense counsel told the jury it was the weakest case he had scene in his 40 years of experience, the prosecutor responded that defense counsel had said the same thing in the last case she tried against him. This claim is also procedurally barred since it was not raised in the motion for new trial or the consolidated appellate brief and it is also procedurally barred from review (Resp.Exh. 5 at 47-52; Resp.Exh. 7); *Reese v. Delo,* 94 F.3d at 1185

Petitioner's claims are also meritless. Petitioner alleges the prosecutor gave a witness list of 23 witnesses, indicated the state's case would take up the remainder of the day, "authorized" the excusal of the defense witnesses then cut her case short. This claim is not supported by the record.

The trial court recessed at 4:22 p.m. on February 23, 1994, the second day of trial (Resp.Exh. 2 at 441). Prior to the recess, counsel indicated they could not finish that day *(Id.* at 440). The court agreed to recess for the evening but indicated its hope that the case would conclude "very quickly in the morning so the jury can go to work" *(Id.* at 440).

The next morning, February 24th, the trial began at 9:13 a.m. (Resp.Exh. 3 at 442). The state rested after calling

two additional witnesses and the court recessed for ten minutes at the end of the state's case at 9:59 a.m. (Resp.Exh. 3 at 490).

The defense presented evidence until the noon recess at 12:05 p.m. (Resp.Exh. 4 at 571). Apparently after lunch defense counsel noticed petitioner's three alibi witnesses had left the courthouse. He put petitioner on the stand and petitioner testified he had seen them during a morning recess *(Id.* at 575). Counsel stated the witnesses had been subpoenaed for 9:00 a.m. on the 24th *(Id.* at 582). Defense counsel indicated that the alibi witnesses left around 11:00 a.m. and did not return *(Id.* at 576).

The trial record thus indicates that the potential witnesses left *after* the state's case had been completed and for whatever reason chose not to testify for petitioner. Nothing in the trial record indicates the prosecutor in any way told the witnesses they should leave or indicated that the state's case would take up the remainder of the third day of trial. This is in fact refuted by the record.

During the defense closing argument, defense counsel stated he had been trying cases for 43 years and never seen a case as weak as this *(Id.* at 618). During the state's rebuttal argument, the prosecutor pointed out that defense counsel had made the same argument in the last case she tried against defense counsel *(Id.* at 618-619). Defense counsel did not object but stated he did not remember that case *(Id.* at 620). Also without objection the prosecutor asked the jury "Where are those alibi witnesses Mr. McMullin promised you from opening? They're not here" *(Id.* at 624).

The prosecutor properly commented on a statement made by defense counsel implying that defense counsel had extrajudicial knowledge, and the prosecutor properly commented that promised evidence was not presented. It cannot be reasonably argued that the trial court violated

petitioner's constitutional rights by not *sua sponte* declaring a mistrial. Petitioner's claims are clearly meritless as well as barred.

GROUND 4: Petitioner alleges the evidence was insufficient to support his convictions for first degree murder and armed criminal action. This claim was not raised in petitioner's consolidated appeal and is therefore procedurally barred from review (Resp.Exh. 7; *Reese v. Delo*, 94 F.3d at 1185).

Petitioner's ground is also meritless. Petitioner was identified by an eyewitness as a participant in the shooting of Steven Shelby (Resp.Exh. 9 at 2-3). A reasonable jury could have convicted petitioner of first degree murder § 565.020, RSMo 1994 and armed criminal action § 571 .01 5, RSMo 1994. No constitutional violation occurred. *See Jackson v. Virginia*, 443 U.S. 307, 320 (1979).

GROUND 5: Petitioner alleges that his sentence was unconstitutionally disproportionate because his accomplice who was the actual shooter received a lesser sentence than he did. This claim was not in the motion for new trial or the consolidated appellate brief and is procedurally barred from review. *See* (Resp.Exh. 5 at 47-52; Resp.Exh. 7); *Reese v. Delo*, 94 F.3d at 1185. Further, petitioner's claim is legally meritless. *See Harmelin v. Michigan*, 501 U.S. 957 (1991) (questioning whether a term of years can ever be so disproportionate as to violate the Eighth Amendment and upholding a sentence of life without parole for cocaine possession).

GROUND 6: Petitioner alleges that the trial court violated his right to due process of law by not granting a continuance when his alibi witnesses disappeared from the courthouse. Petitioner also alleges that the *trial court erred in* not

allowing him to present the testimony of his accomplice Reginald Rhodes.[4]

Petitioner's claim concerning a continuance is procedurally barred. Although petitioner's point relied on perfunctorily mentions the United States Constitution (Resp.Exh. 7 at 11), petitioner's argument relied solely on the state law theory of abuse of discretion *(Id. at* 11-17). The Missouri Court of Appeals rejected the abuse of discretion for the independent claim and adequate state law reasons that the motion for continuance was not made in writing as required by law *and* the motion as presented did not meet the requirements which must be shown to gain a continuance due to the absence of a witness under Missouri Supreme Court Rule 24.10 (Resp.Exh. 9 at 4-5).

Petitioner's failure to argue a constitutional law theory in the argument portion of his brief defaulted that theory under Missouri law. *See State v. Isa*, 850 S.W.2d 876, 900-901 (*Mo. banc* 1993); *State v. Gott*, 784 S.W.2d 344, 346 (Mo.App., S.D. 1990); *State v. Franks*, 685 S.W.2d 845, 849 (Mo.App., E.D. 1984); *State v. Harris*, 670 S.W.2d 73, 81 (Mo.App., W.D. 1984). Because the Missouri Court of Appeals denied petitioner's claim based on the independent and adequate state law ground that the motion for continuance was defective, petitioner's federal constitutional claims are barred from review. *See Harris v. Reed*, 489 U.S. 285 (1989).

Petitioner's constitutional claim is also substantively meritless. The trial court had no constitutional obligation to delay petitioner's trial because petitioner's witnesses decided to absent themselves. *See United States v. Bonadonna*, 775 F.2d 949, 951-959 (8th Cir. 1985) (Trial court acted correctly in denying continuance when defendant changed lawyers two

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[4] On appeal petitioner alleged defense counsel was ineffective for not calling Rhodes, not that the trial court would not allow Rhodes to testify (*See* Resp.Exh. 7).

weeks prior to trial date and on the even of trial asked for a continuance so new counsel could become familiar with the case); *United States v. Ware*, 890 F.2d 1008, 1010 (8th Cir. 1989) (Trial court acted correctly in denying continuance when Petitioner decided to proceed *pro se* two days prior to trial); *Swindler v. Lockhart*, 885 F.2d 1342, 1350 (8th Cir. 1989) (Trial court appropriately denied continuance prior to penalty phase when no *justifiable reason* was provided for the requested delay). *See also Wise v. Bowersox*, slip op. No. 97-1139 at 11-14 (8th Cir. Feb. 20, 1998) (Trial court did not commit constitutional error by denying a continuance when *pro se* capital defendant requested counsel prior to penalty phase of trial and requested 24 hour continuance for counsel to prepare a penalty phase defense).

GROUND 7: Petitioner alleges that the cumulative effectiveness of all the errors he alleges rises to the level of a constitutional violation even if the individual claims do not. This claim was not raised in petitioner's motion for new trial or petitioner's consolidated appellate brief (Resp.Exh. 5 at 47-52; Resp.Exh. 7). The claim is procedurally barred. *Reese v. Delo*, 94 F.3d at 1185.

The claim is also meritless. *See Girtman v. Lockhart*, 942 F.2d 468, 475 (8th Cir. 1991) ("cumulative error does not call for habeas relief since each claim must stand or fall on its own").

WHEREFORE, for the reasons stated above, the respondent prays that this Court deny petitioner's petition with prejudice without further judicial proceedings.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
/s/ Michael J. Spillane
Assistant Attorney General
Missouri Bar No. 40704

Post Office Box 899
Jefferson City, Mo 65102
(573) 751 -3321
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing document, has been mailed, postage prepaid, this 11th day of March, 1998, to:

Remon Lee
Register No. 167441
Crossroads Correctional Center
1115 East Pence Road
Cameron, Missouri 64429

/s/ Michael J. Spillane
MICHAEL J. SPILLANE
Assistant Attorney General

[Filed May 18, 1998]

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 98-0074-CV-W-8-P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

PETITIONER'S REPLY
TO RESPONDENT'S RESPONSE
TO COURTS ORDER TO ANSWER & SHOW CAUSE

COMES NOW, REMON LEE, Petitioner, Proper Person, and replys: that [Resp] has failed to obey the Courts order to answer [Pet] allegations in his habeas petition, & show adequate cause. Resp' merely tells this court that the grounds raised by Pet' are procedurally barred, either because of trial counsels failings or because Appellate counsel failed to raise or argue correctly on direct appeal.

PREMISE OF [PET'S] PETITION:

Petitioner submitted affidavits, and exhibits, to show actual innocence which overcomes/excuses procedural bar. [Pet] gave examples of judicial bias that denied his constitutional right to compulsory process right to put forth a defense. Establishing "an objective factor external to defense impeded counsels efforts."

Petitioner, alleged Ineffective assistance of Appellate Counsel, that Due Process Clause of the 14th Amend. guarantees a criminal defendant the right to effective assistance of Counsel on his First Appeal, as of Right. EVITTS V LUCEY, 105 Sct 830. That the courts have reversed & remanded, when they found an [accused] has been Actually or Constructively, denied counsel on appeal as of right, because prejudice is presumed. Petitioner alleged several instances, including but not limited to the grounds answered by [Resp].

Petitioner, asserted that had the errors not been made by [appellate] counsel, Pet', would likely have prevailed on appeal. That the total and cumulative effect of the errors rendered [pet] trial process in state court, fundamentally unfair. [Pet] contends that the Due Process Clause, guarantees a criminal defendant, the right to a fair and Impartial trial before a Impartial Trier of fact. Pet' gave example as raised on direct appeal [denial of continuance] see [Resp] ex #7 identified as [pet] consolidated appellate brief @13.

[trial judge]: "MY DAUGHTER IS GOING TO BE IN THE HOSPITAL ALL DAY. . . . So I've got to stay with her. . I'TS TOO BAD, THE COURT WILL NOT BE ABLE TO BE HERE TOMORROW TO TRY THE CASE." (Tr,580, 583)

Resp' does not answer or address this allegation, but merely tells this court cumulative error alleging denial of fair trial is not a question for federal review. knowing all the time that: [W]HETHER A CONVICTION FOR A CRIME SHOULD STAND, WHEN A STATE HAS FAILED TO ACCORD FEDERAL CONST. GUARANTEED RIGHTS: IS EVERY BIT AS MUCH A FEDERAL QUESTION AS WHAT PARTICULAR FEDERAL CONST. PROVISION THEMSELVES

MEAN. [W]hat the guarantee and [W]hether they have been denied. The formulation of the authoritative laws, rules and remedies designed to protect people from infractions by the states, of, federally guaranteed rights, . . . cannot be left to the states themselves.

GROUNDS RAISED ON DIRECT APPEAL:

I. The trial court abused its discretion in overruling appellants motion for continuance from the afternoon of February 24, 1994, until the next morning, after appellants subpoenaed alibi witnesses mysteriously disappeared from the courthouse before testifying, because the denial of the continuance violated appellants rights to due process of law and to present witnesses in his defense. As guaranteed by the 5th, 6th, 14th Amend. USC and by art.I, §§ 10 & 18(a) of the Missouri Const., in that the testimony of the missing alibi witnesses was vital, material, & relevant to appellants defense, the continuance requested by counsel was reasonable under the circumstances, & the trial courts reasons for denying the continuance had nothing to do with the case itself, BUT RATHER WITH THE COURTS PERSONAL SCHEDULE.

II. The motion court clearly erred in denying appellants rule 29.15 motion for Postconviction relief without granting an evidentiary hearing, because the record leaves the firm conviction that a mistake has been made, in that appellant has alleged facts, not conclusions, which if true would entitle him to relief, and which are not refuted by the record, in that appellant has alleged that trial counsel failed to exercise the customary skill and diligence a reasonably competent attorney would exercise under the same or similar circumstances, in violation of appellants rights to due process of law and to the effective assistance of cunsel, as guaranteed by the 6th & 14th

Amends. to the USC and by art.I, §§10 & 18(a) of Missouri Const, when trial counsel 1) failed to call appellants codefendant REGINALD RHODES to testify on appellants behalf that appellant was not involved in the shooting death of Steve Shelby, and . . .2) the trial court overruled defense counsels motion for continuance after appellants alibi witnesses mysteriously disappeared from the courthouse after SOME UNKNOWN PERSON TOLD THEM THEIR TESTIMONY WAS NOT NEEDED.

GROUNDS RAISED IN PCR 29.15, FIRST AMENDED MOTION:

1. Denied Due Process; a) Movants alibi witnesses, James Edwards, Gladys Edwards, and Laura Lee were told by an unknown person that they could leave the courthouse because they were not needed to testify. In fact, [they] were essential witnesses for movants defense, because movant expected them to testify and establish he was visiting his family, including parents, James and Gladys Edwards, in Ventura, Cali. during the entire month of August, 1992. The testimony of [these] witnesses was necessary for movants defense, since the state alleged movant was the get-away driver for Reginald Rhodes in the August 27, 1992, shooting death of Steven Shelby . . . his witnesses left under the mistaken impression that their testimony was not needed . . . Movant was denied his right to PRESENT EVIDENCE IN HIS DEFENSE, [] compulsory process, inter alia see [Resp] Ex #6, **21-22; b) denied right to fair trial, due process of law, to effective counsel when counsel failed to object to Courts BASIS FOR DENYING THE COTINUANCE, and clearly states [Resp Ex.6, **23-24] DENIED COMPULSORY PROCESS. c) trial counsel failed to adequately consult with movant about testifying on his own behalf at trial,

after witnesses left, see Resp Ex 6.; d) trial counsel James L. McMullin failed to object to the trial court submitting the charge of mur. in 1st degree to the jury under instruction 6, which did not require the jury to find deliberation in aiding or encouraging Reginald Rhodes to cause the death of Steve Shelby. inter alia. e) trial counsel failed to object and request mistrial when Steve Shelby sister, Rhonda testified she saw movant mear the scene of the shooting & in the presence of Reginald Rhodes the day before the shooing. Counsel had not investigated Rhona prior to trial. . . . , appeared to be suprised at Rhonda Shelby testimony, failed to request continuance to conduct investigation, [. . .] That Reginald Rhodes [codefendant] should have been called to testify at movants trial. Rhodes pleaded guilty to the offenses charged against movant, and had informed movant he would be willing to testify on movants behalf TO THE FACT THAT MOVANT HAD NO KNOWLEDGE . . . WAS NOT A . . . PARTICIPANT. A reasonable probability exists that the result of the trial would have been different had counsel called Rhodes to testify, since Rhodes may have provided a defense for Movant.....

2. Movant . . . does not waive any claim of which he does not have knowledge after the exercise of due diligence in investigating this case.

3. Movant hereby expressly request an evidentiary hearing on the claims raised.

GROUNDS IN PRO SE 29.15 MOTION:

a) failure to request alibi instruction;

b) failure to object to states jury instructions

GROUNDS RAISED IN MOTION FOR NEW TRIAL:

Defense attorney raised eight (8) grounds, see [Resp] Ex.5,-**47-52. These grounds included Insufficiency of evidence; denial of continuance; and denial of IMPARTIAL TRIER OF FACT, @ ¶4. see also ¶9, for preservation of COMPULSORY PROCESS ground raised in [Pet] habeas in this court.

MOTION FOR JUDGEMENT OF ACQUITTAL
AT THE CLOSE OF ALL THE EVIDENCE:

Defense attorney raised seven (7) grounds; including insufficiency of evidence; see [Resp] Ex. 5,-**45-46.

MOTION FOR JUDGMENT OF ACQUITTAL
AT THE CLOSE OF THE STATE'S EVIDENCE:

Defense attorney raised seven (7) grounds, including insufficiency of evidence; see [Resp] Ex.5-**43-44.

RESPONDENTS CONTENTION :

THAT the only grounds raised on consolidated appeal are: i) trial court erred in denying continuance [Compulsory Process]; and ii) trial counsel was ineffective for not calling codefendant Reginald Rhodes, and that trial counsel was necessarily ineffective after Pet's alibi witnesses left without testifying because no counsel could be effective under those circumstances. Resp' tells the court that for reasons given by the state that failing to call Reginald Rhodes was trial strategy is virtually unchallegeable and that it must be proved what the testimony would have been and that the witness was willing to testify. That for these reasons it was not err to deny this point on direct appeal.

Pet' asserts that it was not trial strategy and the record shows it was not, See Pet's Ex.-A.1 attached to habeas pet. [*14 TR.Trans], The attorney Mr. McMullin clearly

states HE HAD NO KNOWLEDGE [RECOLLECTION] that MR RHODES WAS GOING TO OR WILLING TO TESTIFY. With no recollection, it could not have been trial strategy. Pet' also refers the court to [Pet] Ex. 1, the affidavit of Mr. Rhodes clearing pet' of any involvement and stating he was willing to testify. Showing actual innocence, which overcomes the procedural bar. Further warranting review by this court. Because there is clearly a denial of Compulsory Process the right to put forth a defense, by presentation of witnesses, by the denial of continuance. It is clear that had a jury heard the testimony of Mr. Rhodes they would have found pet' not guilty because it would have surfaced who actually drove the car.

FOR CLARIFICATION PURPOSES:

petitioner, attaches to the appendix herein: Four (4) Investigative Report, CASE DOCUMENTS. CONSISTING OF 1 Pg ea. viz: interviews of witnesses,

a) the mother of the victim DOROTHY M. SHELBY; she tells the police it was Reginald J. Rhodes and TERRY T. BARRETT [AKA Tat-Tat] was the driver of the truck;

b) the brother of the victim ERIC E. SHELBY; he tells the police that the BARRETTS were looking for the victim, specifically Tat-Tat Barrett and Man-Man, for theft of some car wheels taken in a breakin;

c) TERRANCE COLLINS, who was approached by Barrett, told the police that Ta-Tat suspected the victim of ripping him off;

d) OTIS CLARK, A FRIEND of the victim, stated it was possible the victim got the rims from the Barretts house, that the victim was trying to sell for $1,750.00 one week prior to the shooting;

Pet's offers these exhibits to show that the state already knew who the driver of the car was and the family knew, further the state knows that when Mr. Rhodes pled guilty, they were given the knowledge that [pet] was not involved and Tat-Tat was the driver of the car. Pet's name was never mentioned as a suspect to this crime. Had the jury been informed of this by the testimony of Mr. Rhodes, coupled with the testimony of def' alibi witnesses. The jury would have been aware that Pet' is innocent of these charges.

This is why the states interference with the def' witnesses testimony amounts to external factors, that overcome the procedural bar. The Resp' tells this court that the reasons given by the state court that the witnesses abandoned the [pet] justify the denial of an evidentiary hearing and the denial of relief. Petitioner, refers the court to [Ex.'s 2,3,4] provided in the motion to include documents; These aff's of alibi witnesses, Laura Lee, Gladys Edwards, & Minister, James Edwards, all explain to the court that they traveled from California to testify; that an officer of the court told them to leave because their testimony would not be needed until the following day.

The importance of the Alibi witnesses is not refuted by the record below. The record shows that trial counsel should have made his communication clear with the ALIBI WITNESSES, and ensured their presence and when the denied the continuance to secure their testimony after he had promised the jury they would testify & what they would testify to, the state & trial court knew they had given statements. The trial court should not have DENIED THE COMPULSORY PROCESS RIGHT.

Petitioner stands by his assertions in his habeas petition and states that the actual innocence provided & shown in

the affidavits submitted, and his claim that appellate counsel was ineffective for not raising the grounds raised in the habeas petition along with the external factors interfering with the defense function are enough to overcome the procedural bar. Fundamental fairness was not afforded to [Pet] by the judges merely saying that his daughter was to be in the hospital and this was the reason for denying the continuance.

Pet' further states that the appellate counsels abandonment of issues preserved in the motion for new trial constitutes constructive denial of appellate counsel. Just as Pet' was able to secure the affidavits from the witness, the appellate & PCR attorneys could have done the same, to enable the judges to make an informed decision. This shows the record below was not adequately developed for review by subsequent judges. The portions of the record relied on by Respondent are ambiguous or contradictory, particularly those related to the denial of continuance as denial of Compulsory Process and whether Mr Rhodes the codefendant's testimony would have been favorable. The Resp' relys entirely on the ruling of the state courts and state rules and standards. Which in itself is error and no grounds to bar review by this court.

Whether a state procedural rule is adequate to bar federal review is an issue of federal law, to be decided by the federal Court. *Williams* v *Lockahart*, 873 F2d 1129, 1131-32 (8th Cir '89).

A federal habeas court may consider the merits of a pet's procedurally defaulted claims if the petitioner establishes both cause for and prejudice from his default. To establish cause, pet' must show that some external factor, . . . INTERFERENCE BY STATE OFFICIALS . . . ARE EXAMPLE OF SUCH FACTORS *Amadeo v*

Zant, 108 Sct 1771, 1776-77; Parkus v Delo, 33 F3d 933, 938 (8th Cir '94).

Pet' herein has established cause for his default because the reasons for the disappearance of his Alibi witnesses was not available to his PCR counsel or his Appellate Counsel and neither made an effort to secure the reasons. The courts are learning for the first time by the affidavits provided herein.

The Respondent's response is GENERIC and does not address the Federal Standards of review; but mere states procedural bar, failing to acknowledge that the lack of fundamental fairness in state court gave the prosecution an unfair advantage that resulted in the conviction of an innocent person.

It can clearly be determined that a jury would more likely than not find the Petitioner herein not guilty with the evidence & testimony presented here with the affidavits.

CONCLUSION:

Petitioner would ask the court to allow a hearing in this matter, in order to reach the merits of [Pet's] claims. To direct parties to submit witness lists including whether the witness will testify live or by way of deposition, a brief synopsis of each witnesses' testimony, and an explanation of why such evidence is not cumulative exhibit lists including a brief statement explaining the relevance of such exhibit and why it is not cumulative; briefs addressing the merits of [Pet's] const. claims; and any depositions of witnesses whose testimony will be presented in such fashion. Because Pet' presents a strong actual innocence claim.

The Resp' has relied on the record of a state court that failed to hold a full and fair hearing. Petitioner has alleged sufficient grounds for release, relevant facts are

in dispute as to why the alibi witnesses left the courthouse and to whether or not Mr. Rhodes would have testified, and the reason why the trial judge denied the continuance.

Petitioner would ask that he be remanded to state court for new trial, or evidentiary hearing, or his release be ordered or what ever this court feels is in the Best Interest of Justice.

Respectfully submitted,

/s/ Remon Lee
REMON LEE #167441
Crossroads Cor. Cntr.
1115 E. Pence Rd.
Cameron, Mo. 64429

Nkuba

CERTIFICATE OF SERVICE

NOTICE:

This document is subject to the federal rules of evidence 28 USC § 1746. I certify verify state that the statements in this document are true and correct, under the penalty of perjury.

Executed on: May 11, 1998

Signature: /s/ Remon Lee
REMON LEE

I Remon Lee, certify that a true copy of the foregoing was mailed postage prepaid to the Missouri Attorney General Office on: May 11, 1998 and the original to the Clerk of U.S. District Court, Western Dist. of Missouri, this 11th day of May 1998.

/s/ Remon Lee

REMON LEE

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT [CASE DOCUMENT]

Case # Supp. 92-123374

TITLE OF INVESTIGATION	SUBJECT OF REPORT
HOMICIDE:	Interview:
Shelby, Steven B/M, 9/10/70 3010 E. 61st St. 444-5450	Dorothy M. Shelby, B/F, 5/30/49 3010 E. 61st. 444-5450

REPORT BY:	ASSIGNMENT:	DATE:	PAGE 1
Det. R Hartman, 3097	Homicide Unit	08/27/92	OF 1 PAGES

/s/ Robert E. Hartman

On 8/27/92 at 1800 hours, Det. Hartman was contacted by Ms. Dorothy M. Shelby, the mother of the victim. Ms. Shelby stated she had just received a call from an unknown person that stated that Reginald J. Rhodes, B/M, 7/17/74, of 2321 E. 71st Terr. was the shooter of her son and Terry T. Barrett, B/M, 7/23/71 of 5320 Brooklyn was the driver of the red truck. Ms. Shelby also stated she had heard that Rhodes and Barrett hung around together and Barrett had a red pick-up.

It should be noted that the caller told Ms. Shelby that the shooter was Reginald Rhodes, who lived on 71st and 72nd St and hangs at 5619 Michigan, also that the driver of the truck was Terry Barrrett. The correct names and addresses were discovered in the KCPD computer.

Supervisor: /s/ [illegible]
ekf/shl
Form 107 P.D.(10-80)

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT [CASE DOCUMENT]

Case # Supp. 92-123374

TITLE OF INVESTIGATION	SUBJECT OF REPORT
HOMICIDE:	Interview:
Shelby, Steven B/M, 9/10/70 3010 E. 61st St.	Eric E. Shelby, B/M 3010 E. 61st. 444-5450

REPORT BY:	ASSIGNMENT:	DATE:	PAGE 1
Det. Dresselhaus,	Homicide Unit	08/27/92	OF 1 PAGES

/s/ Dressel Haus

On 8/27/92 at about 1615 hours, I interviewed the above listed subject in regards to the above captioned offense. He identified himself as the victim's brother. He was at 3812 E. 71st with a Walker Perryman, when another friend, Randy Palmer, 3705 Gregory, 363-8147, came by and told him his brother had been shot. Randy then drove him to the scene. He did not know how Randy had found out. The last time he had seen his brother was on Tuesday, 8/25/92, at his sister's, 6621 Askew. His brother was there with two of his best friends, David Haynes, B/M, 21, 2245 E. 68th, and Roderick Terrell Kemp, B/M, 21 years old, who lives near 74th and College. He talked to the victim on the phone Wednesday, 8/25/92, at about 1700 hours, and his brother wanted him to join him at a motel. He did not know what hotel his brother was staying in but his friend, Kemp, would know.

He went on to state that his brother had recently been told that the Barretts were looking for him. He believed that it was Monday, 8/24/92 when he had a three way phone conversation with the victim and their brother Mark who is in jail in Jefferson City. Mark told them that he had heard from a source, in jail with him, that a Tat-Tat Barrett and a Man-Man, were looking for who broke into Barrett's house. The

man in jail with the brother had a friend named Pee-wee, who was approached by Tat-Tat Barrett. Apparently Tat-Tat had been told that the victim and a cousin had broken into the house. Further, that possibly a set of car wheels had been taken. The brother Mark warned the victim to watch out. The break-in at the house was about three or four weeks ago. Shelby went on to state that he believed he knew who Pee-wee was. He believed Pee-wee was a Terrence Clark who lives near 55th and Olive, second house north, on the west side of Olive.

The car the victim was driving belonged to a Cushmire Muhammad who lives at 7108 Bales. He believed Cushmire gave the car to his brother yesterday, 8/26/92, just before Cushmire went to jail.

Supervisor: /s/ [illegible]
ekf/eee
Form 107 P.D.(10-80)

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT [CASE DOCUMENT]

Case # Supp. 92-123374

TITLE OF INVESTIGATION	SUBJECT OF REPORT
Homicide:	Interview of:
Shelby, Steven b/m, 9-10-70	Terrance Collins, b/m 11-16-73 3864 E. 59 Terrace, no phone Grandmother's (363-5630)

REPORT BY:	ASSIGNMENT:	DATE:	PAGE 1
Det. J. Dresselhaus,	Homicide Unit	9/2/92	OF 1 PAGES

/s/ Wessehaus

On 9-2-92, at about 0950 hours, Det. Wantland and I responded to the above subject's residence where he was contacted in regards to the above captioned offense. He admitted that his nickname was PeeWee and that his grandmother stays at 5502 Olive. He admitted to being a friend of the above listed victim because they had grown up in the same neighborhood together. He also admitted that he had been approached by the subject, Te-Te Barrett about the victim just prior to his death. He stated that he was not sure of the exact date but he believed that it was the Wednesday just before the offense, which would be 8-26-92, that he was approached by Te-Te. Barrett had apparently seen him riding in a car with another friend of his known as Eric Hudson. Barrett then approached him when Hudson was no longer in his company and asked him who Hudson was and if Hudson might be responsible for ripping him (Barrett) off. He stated that he told him that he was sure Hudson had nothing to do with ripping Barrett off. He stated that Barrett asked him if the victim was involved in ripping him (Te-Te) off and he told him that he did not know. He was left with the impression that Barrett suspected the victim of having ripped

him off. He also admitted that he had talked to a relative of his by the name of James Ron Clark at the penitentiary about being approached by Te-Te Barrett. He also admitted that the word on the street was that Te-Te Barrett had hired someone to kill the victim.

dca/itc

Supervisor: /s/ [illegible]
Form 107 P.D.(10-80)

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT [CASE DOCUMENT]

Case # Supp. 92-123374

TITLE OF INVESTIGATION	SUBJECT OF REPORT
HOMICIDE:	Interview of:
Steven S. Shelby B/M, 09-10-70 3010 East 61st Street	Otis Clark, B/M, 04-26-71 3519 East Gregory #444-6862

REPORT BY:	ASSIGNMENT:	DATE:	PAGE 1
Det. R. Hartman #3097	Homicide Unit	08-27-92	OF 1 PAGES

/s/ Robert E. Hartman

On 8-27-92, at 1550 hours, Detective Hartman notified Otis Clark, a friend of the above victim, of his death. Mr. Clark stated he had received a telephone call from an unknown friend that someone had been "slayed" in the blue Chevrolet that belongs to Cush. Mr. Clark stated he knew that Cush Meyer Mohamad, who live at 7108 Bales, owns the blue Chevrolet but Cush was in jail and the victim was taking care of his car for him. Mr. Clark stated he then went over and informed the victim's family that it might have been the victim who was shot. Mr. Clark stated he had last seen the victim in Cush's car at the Amoco Station on 63rd and Prospect at 1800 hours, on 8-26-92, at which time the victim's friend, David L. Haynes, B/M, 2245 East 68th Street, was driving the car. Mr. Clark stated the victim would have been with David Haynes or Roderick "Terrell" Kemp, B/M, 2-26-71, at 7429 College. Mr. Clark stated the victim's mother had received a call from David, who asked for the victim just prior to our arrival. Mr. Clark stated that while we were talking he was paged by Terrell Kemp, however, Mr. Clark then returned Terrell's car and Terrell stated he had not paged Mr. Clark. Mr. Clark was asked what he believed was the reason the victim was shot and Mr. Clark stated that it

was possibly because of four gold Daytona rims the victim was trying to sell for $ 1,750.00 one week earlier. Mr. Clark was asked if he knew anyone with a red and white pick-up and he said no. Mr. Clark was asked if he knew the Barrett's at 58th and Park and he stated he did but the victim was smarter than to do something to them. Mr. Clark was asked if he knew anything about the victim doing a burlgary at the Barrett's house. Mr. Clark stated he had not heard anything about it but it would be a possible location the victim would have gotten the rims. Mr. Clark stated a lot of people take those gold Daytona's from people at gunpoint.

It should be noted Cush has been found to be Cushmeer S. Anderson, B/M, 7-7-75, of 7108 Bales.

Supervisor: /s/ [illegible]
dec/ioc
Form 107 P.D.(10-80)-

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-C V-W-6P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

SUPPLEMENTAL RESPONSE TO PETITION FOR
HABEAS CORPUS
ADDRESSING THE PETITIONER'S AFFIDAVITS

Comes now respondent, by and through counsel and states as follows:

The petitioner has supplemented his petition with four affidavits. These affidavits all appear to be in support of his ground three an allegation that the prosecutor tricked the petitioner's alibi witnesses into leaving the courthouse.[1]

The petitioner's underlying claim is procedurally barred. No variation of the claim was presented in the new trial motion or the post-conviction relief motion or the consolidated appeal. Obviously the claim if it were true could have been discovered through due diligence in time to present the claim in the state courts. It was not presented, and in fact the delay in the presentation of the claim as well as creating a procedural bar makes the claim even more incredible.

[1] In his original response the respondent pointed out that as well as being procedurally barred, the scenario set out by the petitioner in the habeas petition is refuted by the facts in the record (Response at 6-8).

The petitioner cannot establish good cause for not raising this claim in state court. There is no plausible good explanation external to the defense why the claim was not presented on direct appeal as a misconduct claim or in a post-conviction motion as an ineffective assistance of trial counsel claim.

The affidavits themselves clearly do not lift the procedural bar under the newly discovered evidence of actual innocence gateway to review. *See Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996) (if factual bases for an affidavit existed in time to present claim on appeal and it could have been discovered through due diligence, the affidavit was not *newly discovered evidence* that could defeat a procedural bar). Petitioner is barred from a hearing in this Court to further develop his claim unless the factual predicate of the claim could not have been discovered through due diligence in a timely manner and the affidavits establish by clear and convincing evidence that no reasonable fact finder would have found him guilty but for constitutional error. § 28 U.S.C. 2254(e)(2).

The affidavits the petitioner has presented are relevant only to his ground 3. As a matter of law this ground is barred from review and the affidavits as a matters of law are insufficient to lift this bar or entitle the petitioner to a hearing for the development of further evidence. Therefore the affidavits can have no effect on the outcome of the habeas petition.

WHEREFORE, the respondent prays that the petition for habeas corpus be denied with prejudice without further judicial proceedings

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
/s/ Michael J. Spillane
Assistant Attorney General
Missouri Bar No. 40704

Post Office Box 899
Jefferson City, Mo 65102
(573) 751-3321
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the documents have been mailed, postage prepaid, this 25th day of March, 1999, to:

Remon Lee
Register No. 167441
Crossroads Correctional Center
1115 East Pence Road
Cameron, Missouri 64429

/s/ Michael J. Spillane
MICHAEL J. SPILLANE

[Filed Apr. 19, 1999]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-6-P

REMON LEE,
Petitioner,

vs.

MIKE KEMNA,
Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed this *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his 1994 conviction for first degree murder and the sentence of life imprisonment without parole pursuant thereto, which were entered in the Circuit Court of Jackson County, Missouri.[1] Petitioner raises seven (7) grounds for relief, all of which respondent contends are procedurally barred from federal habeas corpus review because petitioner did not present them in his consolidated direct appeal and appeal from denial of state post-conviction relief pursuant to Mo. Sup. Ct. R. 29.15. *See* Respondent's Exhibit 7; *State v. Lee*, 935 S.W.2d 689 (Mo. Ct. App. 1996) (per curiam). Respondent further contends that petitioner's claims are without merit.[2]

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[1] Although petitioner does not state that he challenges his conviction and concurrent ten-year sentence for armed criminal action, the Court notes its existence. *See* Respondent's Exhibit 9.

[2] Because the Court agrees that petitioner procedurally defaulted Grounds 1-5 and 7, a review of the merits of those claims is unnecessary and inappropriate.

Petitioner raised only two points in his consolidated appeal brief: (1) the trial court erred in overruling his motion for a continuance after his alibi witnesses disappeared from the courthouse before they were to testify; and (2) his trial counsel was ineffective for failing to call petitioner's co-defendant at trial and when the trial court overruled defense counsel's motion for a continuance after petitioner's alibi witnesses disappeared without testifying. Respondent's Exhibit 7, pp. 7-10.

Petitioner raises the following grounds for relief in this federal petition: (1) he was forced against his will to accept an appointed attorney not of his own choosing because he wanted to retain a different attorney when his previously retained attorney withdrew from the case; (2) the trial judge was biased against him based on three specific instances of conduct or comments; (3) the prosecutor committed misconduct by tricking petitioner's alibi witnesses into leaving the courthouse, rushing her case to a close, and commenting to the jury on the absence of the alibi witnesses; (4) the evidence was insufficient to support his convictions; (5) his sentence is constitutionally disproportionate to that of his co-defendant who actually shot the victim; (6) the trial court violated due process by failing to grant him a continuance when his alibi witnesses disappeared from the courthouse and in not allowing him to present his co-defendant's testimony; and (7) the cumulative effect of all the errors rises to the level of a constitutional violation.

Procedural Default—Grounds 1-5 and 7

A review of the record demonstrates that petitioner procedurally defaulted Ground 1 by failing to raise it in his pro se or amended Rule 29.15 motions or in his consolidated appeal brief. Respondent's Exhibits 6 and 8. Grounds 2, 3, 5, and 7 were procedurally defaulted by petitioner's failure to raise them in his motion for new trial or in his consolidated

appeal brief. Respondent's Exhibits 5 and 7. Ground 4 also was not raised in petitioner's consolidated appeal brief. Respondent's Exhibit 7.

In *Coleman v. Thompson*, *501* U.S. 722 (1991), the Supreme Court held:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. Cause, actual prejudice, and the probability of a "fundamental miscarriage of justice" are to be judged under criteria set out in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Murray v. Carrier*, 477 U.S. 478 (1986). *Coleman*, 501 U.S. at 748-50.

Petitioner contends that either trial counsel's or appellate counsel's ineffectiveness caused his state procedural default of Grounds 1-5 and 7 and that he is actually innocent of the crimes as evidenced by the affidavits of his mother, stepfather, and sister that he could not have committed the crimes in question because he was with them in California during August, 1992. Doc. Nos. 6 and 12. Petitioner also contends that an officer of the court caused his alibi witnesses to leave the courthouse before they were called to testify.

Petitioner cannot allege ineffective assistance of direct appeal counsel as cause for his state procedural default because he has failed to exhaust such a claim independently in the state courts as he must do before it can be used to establish cause under *Murray v. Carrier*, 477 U.S. at 489. *See Hall v. Delo*, 41 F.3d 1248, 1250 (8th Cir. 1994); *McKinnon*

v. Lockhart, 921 F.3d 830, 832 (8th Cir. 1990), *cert. denied*, 501 U.S. 1208 (1991).

Moreover, ineffectiveness of his Rule 29.15 trial or appellate counsel cannot constitute legally sufficient cause for his default because there is no constitutional right to effective assistance of counsel in state post-conviction proceedings. *Coleman v. Thompson*, 501 U.S. at 752; *Oxford v. Delo*, 59 F.3d 741, 748 (8th Cir. 1995), *cert. denied*, 517 U.S. 1124 (1996).

Petitioner also has failed to demonstrate that an officer of the court caused his alibi witnesses to leave without testifying. *See* Respondent's Exhibit 8, pp. 12-17. All of his three alibi witnesses were family members whose explanation for their disappearance at trial was available to petitioner or "discoverable through the exercise of due diligence" during the pendency of petitioner's direct appeal and/or state post-conviction proceedings. Thus, petitioner cannot meet the burden of 28 U.S.C. § 2254(e)(l) and (2) to show that the reason he did not develop the factual basis for his Grounds 3 and 6 in the state courts was because the claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or that they rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." Moreover, petitioner also has the burden of demonstrating that "the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

Petitioner has failed to meet the above standards regarding his failure to present the affidavits of his three proposed alibi witnesses to the state courts. Therefore, those affidavits cannot be considered in this federal habeas corpus proceeding. *See Weeks v. Bowersox*, 119 F.3d 1342, 1354

n.12 (8th Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 887 (1998); *Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996).

Not only has petitioner failed to demonstrate cause for his state procedural default, he also has failed to show that he is "probably actually innocent" of the crimes for which he was convicted. *Bowman v. Gammon*, 85 F.3d 1339, 1346 (8th Cir. 1996), *cert denied*, __ U.S. __, 117 S.Ct. 1273 (1997). Therefore, further review of Grounds 1-5 and 7 is not required to prevent a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. at 495.

Trial Court Error in Denying Continuance and in Not Allowing the Testimony of Accomplice—Ground 6

In Ground 6, petitioner contends that the trial court violated his right to due process by not granting his motion for a continuance when his alibi witnesses disappeared from the courthouse and by not allowing him to present the testimony of his co-defendant. Respondent contends that petitioner's claim concerning a continuance is procedurally defaulted because petitioner only made a perfunctory citation to the United States Constitution in his Point I on appeal and relied solely on a state law theory of abuse of discretion in his argument. Respondent's Exhibit 7, pp. 7-8, 11-17. The Missouri Court of Appeals held that the motion for a continuance did not meet the requirements of Mo. Sup. Ct. R. 24.10 and that petitioner failed to demonstrate a reasonable probability of a different outcome if the witnesses had testified. Respondent's Exhibit 9, pp. 4-5. Respondent also contends that petitioner's claim regarding the co-defendant was raised as a claim of ineffective assistance of defense counsel for not calling the co-defendant, not as a claim that the trial court would not allow the co-defendant to testify. Respondent's Exhibit 7, p.9.

Although petitioner specifically cited to the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution

in his brief on appeal and argued that the denial of the continuance violated due process, Respondent's Exhibit 7, p.7, the Court concludes that petitioner's due process claim in Ground 6 was not "fairly presented" concerning the denial of a continuance because the state court's ruling was based on petitioner's failure to comply with Rule 24.10. *See Hall v. Delo*, 41 F.3d 1248, 1249-50 (8th Cir. 1994) (federal claim was not fairly presented to state courts when state court declined to decide federal claim on merits because petitioner violated a state procedural rule). The Missouri Court of Appeals rejected petitioner's claim because it was not made in writing and because it was not supported by the factual showing required by Rule 24.10.

As the Missouri Court of Appeals has noted, moreover, petitioner has failed to demonstrate that "the testimony of the absent witnesses [all family members] was so crucial that it is reasonably probable a different outcome would have resulted" even if he had established an abuse of discretion by the trial court in denying the continuance. Respondent's Exhibit 9, p.5. *See also* Respondent's Exhibit 8, pp. 15-17.[3]

Thus, Ground 6(a) is either procedurally defaulted or without merit, and Ground 6(b) is procedurally defaulted. Petitioner has failed to establish legally sufficient cause for his state procedural default and/or actual innocence for the reasons previously discussed regarding Grounds 1-5 and 7.

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[3] Not only had eyewitnesses to the murder identified petitioner as the driver of the getaway truck, the victim's sister and her neighbor testified that petitioner came to their apartment complex on the night before the murder looking for the victim. Respondent's Exhibit 1, pp. 443-78. Thus, the state had produced overwhelming evidence that petitioner was in Jackson County on the day of the murder and on the previous night.

Accordingly, it is ORDERED that:

(1) the petition for writ of habeas corpus is denied;

(2) petitioner's motion for ruling (Doc. No. 14) is granted; and

(3) this case is dismissed with prejudice.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated: Apr. 19 1999

[Filed Apr. 19, 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-6-P

REMON LEE,

Petitioner,

v.

MIKE KEMNA,

Respondent.

□ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ DECISION OF THE COURT. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: this petition for writ of habeas corpus is denied, and this case is dismissed with prejudice. (HFS)(dw)

Entered on: APR 19 1999

R.F. CONNOR
CLERK OF COURT

/s/ D.M. Weinzerl
D.M. WEINZERL
(By) Deputy Clerk

[Filed May 12, 1999]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DIVISION OF MISSOURI
WESTERN DIVISION

No. 98-0074-CV-W-6-P

REMON LEE, #167441

Petitioner,

vs.

MIKE KEMNA,

MOTION FOR RELIEF FROM JUDGMENT
RECONSIDERATION/REHEARING
OF HABEAS PETITION

NOW COMES Petitioner, in forma pauperis, and pursuant to 28 USCA § 2254, Title VI Habeas proceedings, and petitions for relief from District Courts Opinion of APRIL 19, 1999, denying [Pet's] original federal habeas corpus petition, And ask that the district court STAY [it's] order. Petitioner further states that, this motion be treated as a MOTION FOR RELIEF FROM JUDGMENT pursuant to Rule 60(b), 28 USCA, if a motion for reconsideration is deemed untimely filed. See: *Bedoya v. U.S.*, 11 F.Supp.2d 381 (6/24/98) citing: *U.S. v. Clark*, 984 F.2d 31, 32 (2nd Cir. 1993). In support of this motion, Petitioner states as follows:

1. This Court has misread the record, as submitted and accepted by the previous District Court Judge, when this court stated Petitioner submitted only three (3) affidavits, all from family members; in doing so has denied Petitioner the opportunity to show Actual Innocence, of the crime for which he was convicted.

2. This Court OVERLOOKED that Petitioner filed a MOTION TO INCLUDE DOCUMENTS which was accepted by the previous District Court Judge, consisting of, inter alia, four (4) Affidavits, listed as Exhibits 1-4. The affidavits the Court referred to in [it's] 4/19/99 opinion as from family members, are Exh.'s 2, 3, 4.

3. Petitioner's (Exh. 1), the Affidavit of REGINALD RHODES, was refered to in [Pet's] original habeas pleadings, in support of Petitioners' ACTUAL INNOCENCE. The Respondent made no reference to the affidavit of Mr. Rhodes and the Court in narrating the position of respondent, made no reference to the affidavit of REGINALD RHODES. This Court merely states: "Petitioner failed to show that he is "probably actually innocent" of the crimes for which he was convicted." citing: *Bowman v Gammon*, 85 F.3d 1339, 1346 (8th 1996). Petitioner ask this court to consider the decision in:

   United States ex rel. Gooch v McVica, 953 F.Supp. 1001, (1997), where the Court held: EXCLUDING CONFESSION OF PETITIONER'S COUSIN WAS UNREASONABLE, IN STATE MURDER PROSECUTION, DEPRIVED PETITIONER OF FAIR TRIAL.

4. An examination of the sentencing record shows; it was brought to the trial court's attention that someone was already convicted of this crime. However, the trial court stated [it] did not know someone had already confessed to, and pled guilty to this crime, for which Petitioner went to trial on.

5. It is more likely than not, that no reasonable juror would have convicted Petitioner, if the jury would have been told by the state, someone already confessed and pled guilty to this very charge that Petitioner stands trial,

before them on! The State intentionally withheld this exculpatory evidence from BOTH trial judge and trial jury, in violation of due process. The state had previously accepted the confession & guilty plea of Mr. Rhodes,

In the case of *United States ex rel. Gooch v McVica, Id.* relief was granted because it was found excluding the confession of Pet's cousin was unreasonable & deprived petitioner of fair trial. In the case at bench: the state excluded the confession of REGINALD RHODES, and like Gooch, the instant case was a murder trial and deprived petitioner of a fair trial.

The law is suppose to be EQUALLY APPLIED, the circumstances are the same, except Mr. Rhodes is *not* related to Petitioner in the instant case. The state accepted Mr. Rhodes plea prior to the trial of petitioner, so the knowledge cannot be denied by the state.

Petitioner is allowed to make a showing of actual innocence, and the court is not limited from reviewing the merits.

Petitioner's Exh. 1, the affidavit of Reginald Rhodes, that was OVERLOOKED by this Court; is attached to this Motion as Pet's (Exh. 1) and this affidavit clearly states:

(¶.3) "I REGINALD RHODES WAS IDENTIFIED AS THE SHOOTER [principal], BY AN EYEWITNESS. I PLED GUILTY TO THE SHOOTING DEATH OF MR. SHELBY, AS THE *LONE SHOOTER*. I WAS WILLING TO TESTIFY AT THE EVIDENTIARY HEARING AND THE TRIAL OF MR. REMON LEE, THAT: "HE WAS NOT PRESENT, NOR INVOLVED IN THE SHOOTING DEATH OF MR. STEVE

SHELBY. I WAS TOLD BY THE PROSECUTOR'S OFFICE THAT THEY WANTED REMON LEE, AND DID NOT CARE IF HE WAS INVOLVED OR NOT." "

Clearly, this affidavit supports 'actual innocence' and Mr. Rhodes confession should not have been kept from the jury. Then they could decide whether the other witnesses were mistaken. Also this may have clarified for the other witnesses, that Mr. Lee was not involved.

6. Relief from judgment is extraordinary judicial relief, and may be granted only upon showing of exceptional circumstances. RULE 60(b) establishes grounds on which this court in [it's] discretion may relieve a party from final judgment or order. I provides in relevant part:

> "ON MOTION & UPON SUCH TERMS AS ARE JUST, THE COURT MAY RELIEVE A PARTY . . . FROM A FINAL JUDGMENT, ORDER OR PROCEEDINGS FOR THE FOLLOWING REASONS: (1) mistake, surprise, indavertance, or excusable neglect; (6) any other reason justifying relief from the operation of the judgment, see: *Nemaizer v Baker*, 793 F.2d 58, 61 (1986)."

In the instant case, the court (opinion @ 3) states in denying relief that [Pet] claims ACTUAL INNOCENCE and relies on affidavits of his MOTHER, STEPFATHER, & SISTER. To reiterate these are Exh's 2,3,4, the court OVERLOOKED and made no reference to EXH. 1, the affidavit of REGINALD RHODES in support of actual innocence.

Petitioner ask this court to vacate [it's] April 19, 1999 ORDER, and address the merits of this actual innocence claim pertaining to the Affidavit of Reginal Rhodes, or, ORDER the respondent to address the merits pertaining to the

affidavit of Reginald Rhodes in support of the ACTUAL INNOCENT CLAIM.

ACCORDINGLY, Petitioner ask this motion be granted, and the merits, and actual innocence claim regarding the affidavit of Mr. Rhodes be addressed.

Respectfully submitted,

Remon Lee
Crossroads Cor. Cntr.#167441
Cameron, MO. 64429

CERTIFICATE OF SERVICE

I the undersigned, certify that the original of the foregoing was mailed to:

Clerk of U.S. District Court
811 Grand Ave.
K.C.Mo., 64106

and a copy to the Attorney General office, Jefferson City, Mo. on May 5th, 1999.

/s/ Remon Lee
REMON LEE

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-8-P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

AFFIDAVIT OF REGINALD RHODES

Reginald Rhodes, being truly sworn, states under oath as follows:

1. My name is Reginald Rhodes. I am over 21 years of age, and am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was charged with the death of STEVE SHELBY: that occurred on or about August 27, 1992, and have personal knowledge to the events concerning the death of Mr. Shelby and the conviction of REMON LEE, [in question].

3. I Reginald Rhodes was identified as the shooter [principal], by an eyewitness. I pled guilty to the shooting death of Mr Shelby, as the *lone shooter*. I was willing to testify at the evidentiary hearing and the trial of Mr Remon Lee, that:

> He was not present, nor involved in the shooting death of Mr Steve Shelby. I was told by the prosecutors office that they wanted Remon Lee, and did not care if he was involved or not.

4. I was told by my attorney that Remon Lee had witnesses to prove his where-abouts on the day and time in question. However, Remon Lee wound up getting maliciously prosecuted for a crime he was *not involved in*. He even got more time than I [Reginal Rhodes got].

5. I wish to set the record straight, and testify that Remon Lee is innocent.

I, Reginald Rhodes, hereby certify that the above facts are true and correct, I have not been coerced in any way, and I am signing this under my own free will.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to before me this 15 day of January, 1998.

/s/ Reginald Rhodes
REGINALD RHODES 500710
Jefferson City Correctional Center
P.O. Box 900
Jefferson City, Mo. 65102

/s/ Illegible
Notary Public
Dated: 1-15-98

[Filed May 14, 1999]

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF MIS:
WESTERN DIVISION

No. 98-0074-CV-W-8-P

REMON LEE, #167441

Petitioner,

vs.

MIKE KEMNA,

Respondent.

NOTICE TO CLERK OF COURT
REQUEST TO APPEAL JUDGMENT
OF DISTRICT COURT

Dear Clerk, I received the judgment entered on April 19, 1999, denying my petition for habeas corpus relief. I was told I have 30 days to file NOTICE OF APPEAL.

Pursuant to those instructions, I am notifying the court clerk of U.S. District Court, Western District of Missouri, & also, Michael Gans, United States Court of Appeals, 1114 Market St., St. Louis, Mo. 63101, that: I WISH TO APPEAL THE DECISION TO THE NEXT LEVEL, being 8th Circuit Court of Appeals.

I also would like the court to know that I filed with the District Court a MOTION FOR RELIEF FROM JUDGMENT pursuant to RULE 60(b)., mailed on May 5th, 1999.

Thank you,

Remon Lee #167441
Crossroads Cor. Ctr.
1115 E. Pence Rd.
Cameron, Mo. 64429

CERTIFICATE OF SERVICE

I the undersigned have mailed a copy of the foregoing to all parties on May 12, 1999.

Remon Lee.

[Filed May 19, 1999]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-6-P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND DENYING PETITIONER LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL AND A CERTIFICATE OF APPEALABILITY

On April 19, 1999, this Court denied petitioner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and Judgment was entered pursuant thereto. On May 12, 1999, petitioner filed a motion for reconsideration of the Court's Opinion and Order entered on April 19, 1999, pursuant to Fed. R. Civ. P. 60(b). On May 14, 1999, petitioner filed a pleading entitled "Notice to Clerk of Court Request to Appeal Judgment of District Court." In his motion for reconsideration, petitioner contends that the Court misread the record because petitioner had submitted the affidavits of his co-defendant as well as three affidavits from his family members in support of his claim that he is actually innocent of the crimes for which he was convicted, but the Court made no reference in the April 19, 1999, Opinion and Order of the co-defendant's affidavit.

A review of the April 19, 1999, Opinion and Order reveals that, as argued by respondent, petitioner had raised his claim concerning his co-defendant's proposed testimony as an ineffective assistance of defense counsel claim for failing to

call the co-defendant in his Rule 29.15 motion, not as a trial court error as he does in his federal petition. In any event, this Court addressed petitioner's Ground 6(b) and concluded that Ground 6(b) was procedurally defaulted.

As to petitioner's affidavits of his family members, the Court concluded that they were not "newly discovered evidence" because they were discoverable at the time of petitioner's direct appeal and or state post-conviction proceedings. The transcript of the sentencing proceedings, Respondent's Exhibit 4, pp. 10, 13-16, demonstrates in a similar manner that the information contained in Reginald Rhodes' affidavit was available to petitioner in his state court proceedings. Petitioner's trial counsel stated at the sentencing hearing that he did not call petitioner's codefendant to testify at trial because the co-defendant would have had little credibility with the jury (especially because several eye-witnesses to the murder identified petitioner as the driver of the getaway truck). Respondent's Exhibit 4, P. 16.

Given the questionable veracity of Reginald Rhodes' affidavit, petitioner has not demonstrated that no reasonable juror would have convicted him in light of new reliable evidence of his actual innocence which was not presented at trial, *Schlup v. Delo*, 513 U.S. 298, 326-38 (1995), and which was not discoverable at the time of trial through due diligence. *See Meadows v. Delo*, 99 F.3d 280. 282-83; *Bowman v. Gammon*, 85 F.3d 1339, 1342 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 1273 (1997) (standard for gateway claims of actual innocence as to guilt phase issues).

As to petitioner's notice of appeal, under 28 U.S.C. § 1915, an appeal *in forma pauperis* may be permitted if an affidavit including a statement of all assets possessed and a certified copy of the inmate account statement for the preceding six months are submitted and if the appeal is taken in good faith. *See* Fed. R. App. P. 24(a). If the issues sought to be presented are plainly frivolous, the appeal is not taken in good faith.

Blackmun, *In Forma Pauperis Appeals*, 43 F.R.D. 343 (1967).

Further, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court unless a district judge or a circuit judge issues a certificate of appealability. Fed. R. App. P. 22(b). A certificate of appealability will be issued only if the applicant has made a substantial showing of the denial of a constitutional right and will indicate which specific issue or issues satisfy the showing required. 28 U.S.C. § 2253(c)(2) and (3).

Because petitioner has not stated any basis for overturning the April 19, 1999, Opinion and Order, in Doc. No. 19, this case presents issues which are not deserving of appellate review under the above standards.

Accordingly, it is ORDERED that:

(1) petitioner's motion for reconsideration pursuant to Fed. R. Civ. P. 60(b) (Doc. No. 18) is denied; and

(2) a certificate of appealability and leave to proceed *in forma pauperis* on appeal are denied.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated: May 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2406WMKC

REMON LEE,
Appellant,

vs.

MIKE KEMNA, *et al.*,
Appellee.

Appeal from the United States
District Court for the
Western District of Missouri

The appplication filed by Mr. Lee for a certificate of appealability in the above-referenced case has been considered by the Court and is hereby granted. A certificate is issued on the question of whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance.

September 30, 1999

Order Entered at Clerk, U.S. Court of Appeals,

/s/ Michael E. Gans
MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

[Filed May 25, 2000]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2406

REMON LEE,

Appellant,

vs.

MIKE KEMNA, Superintendent; JEREMIAH (JAY) NIXON, Attorney General, State of Missouri,

Appellees.

Appeal from the United States
District Court for the
Western District of Missouri.
[PUBLISHED]

Submitted: March 13, 2000
Filed: May 25, 2000

Before MORRIS SHEPPARD ARNOLD and FAGG, *Circuit Judges*, and BENNETT, *District Judge*[*]

PER CURIAM.

Remon Lee was tried in Missouri state court on charges of first degree murder and armed criminal action. During his trial, Lee's alibi witnesses failed to appear and Lee moved for a continuance until the witnesses could be brought to the courtroom. The continuance was denied and Lee was convicted and given a concurrent sentence of life without parole on the murder charge and ten years on the armed criminal action charge. The trial court denied Lee's motion for a new trial which alleged ineffective assistance of trial counsel and violation of his due process rights.

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[*] The Honorable Mark W. Bennett, Chief Judge, United States District Judge for the Northern District of Iowa, sitting by designation.

On direct appeal, Lee claimed his trial motion for a continuance and his post conviction motion for a new trial were improperly denied. The Missouri Court of Appeals found the continuance motion was properly denied because it did not comply with Missouri Supreme Court Rule 24.09, which sets out the required form of the motion, and Rule 24.10, which lists the required elements of the motion. The court also found the new trial motion was properly denied because Lee failed to produce evidence showing counsel was ineffective. Lee then filed a 28 U.S.C. § 2254 petition claiming the denial of his motion for a continuance violated due process. The district court denied Lee's habeas petition finding the claim procedurally defaulted. We granted a certificate of appealability on the question of whether denial of Lee's motion for a continuance was a due process violation.

Lee first argues he did not procedurally default his claim. We disagree. Federal habeas review is not available on Lee's due process claim if the Missouri Court of Appeals "rest[ed] [its decision] on a state law ground that is independent of the federal question and adequate to support the judgment," regardless of "whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *accord Hall v. Delo*, 41 F.3d 1248, 1249-50 (8th Cir. 1994). The Missouri Court of Appeals rejected Lee's claim because his motion for a continuance did not comply with Missouri Supreme Court Rules 24.09 and 24.10 and thus the claim was procedurally defaulted.

We reach the merits of Lee's procedurally defaulted claim only if he can show cause for his default and prejudice or actual innocence. *See Wyldes v. Hundley*, 69 F.3d 247, 253-54 (8th Cir. 1995). Lee claims his default should be excused because trial counsel's failure to follow Missouri's motion rules constituted ineffective assistance of counsel. We reject Lee's claim because ineffective assistance of counsel must be

presented to the state court as an independent claim before it can be used to establish cause for a procedural default. *See id.* at 253. Although Lee raised a claim of ineffective assistance in his postconviction motion for a new trial, he did not specifically allege failure of trial counsel to present properly the motion for a continuance. *See id.* (habeas petitioner must present to state court same specific claim of ineffective assistance made out in habeas petition). Thus, the Missouri courts had no opportunity to consider whether Lee's trial lawyer was ineffective for failing to present the motion properly and Lee cannot present that claim now. Because Lee has not shown cause for his default, we do not reach the issue of prejudice.

An actual innocence claim requires Lee to show "new reliable evidence . . . not presented at trial" establishing "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 254 (citations omitted). Lee has failed to make the required showing because the factual basis for the affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier. *See Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996). Even assuming the alibi testimony was new evidence, Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi.

We affirm the denial of Lee's habeas petition.

BENNETT, Chief District Judge, dissenting.

As Justice Fortas observed, "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 292 (1969). "Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'" *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72,

96-97 (1977) (Stevens, J., concurring)). With this view of the importance and purposes of a writ of *habeas corpus*, I am unwilling to condone what I believe was a conviction in Lee's case that violates "fundamental fairness." Furthermore, I do not believe that Lee's due process claim has been procedurally defaulted, as the majority concludes, even under the current status of federal *habeas* law, which, in my view, increasingly elevates tortuous and tangled procedural impediments over fundamental fairness. *See Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights" in *habeas corpus* actions). For these reasons, I must respectfully dissent.

To explain why I believe that the decision below must be reversed, I find that a more detailed discussion of the circumstances of this case is required. Lee was tried in Missouri state court on charges of first-degree murder and armed criminal action. At the opening of his trial, Lee's defense counsel promised the jury an alibi defense, complete with three alibi witnesses, who would establish that Lee was not in Kansas City, the location of the murder, on the day of the murder, but was instead in California. Indeed, the promised alibi witnesses—Lee's mother, stepfather, and sister—had voluntarily traveled from California to Missouri to testify on Lee's behalf at his trial and were present at the courthouse as trial began. Moreover, these witnesses were under subpoena and had previously met with defense counsel.

In its case in chief, the government presented the testimony of two witnesses who identified Lee as the getaway driver and two other witnesses who placed Lee in Kansas City within the twenty-four hours preceding the murder. However, the government presented no physical evidence linking Lee to the murder. On the Thursday morning before the state rested its case, Lee's alibi witnesses were present at the courthouse. However, following a lunch recess, the three witnesses could

not be located. Lee's alibi witnesses have since provided affidavits in which they aver that they left the courthouse only after being told by a court security officer that their testimony would not be needed until the following day, because the state's case would take up the remainder of the day. No judge of any stripe, state or federal, trial or appellate, has yet passed on the reason for the alibi witnesses' sudden disappearance from the courthouse just before Lee's defense was to begin.

Upon discovering that Lee's three alibi witnesses were not present in the courthouse after the lunch recess, Lee's counsel orally informed the court of that fact and requested that the court grant a continuance in order for him to attempt to secure the testimony of the witnesses. Trial counsel also informed the court that the witnesses were thought to be still in town, because Lee's mother and stepfather had plans to attend a religious activity in Kansas City that evening. The trial court announced that the trial could not be continued to the following day, Friday, because the judge intended to be at the hospital when his daughter had surgery. The trial court also informed the parties that the trial could not be continued to the following Monday, because the judge had another trial set to commence that day. The state trial judge concluded, without a scintilla of evidence or a shred of information as to why the alibi witnesses were absent, and without making any attempt to enforce the subpoenas for their attendance, that the alibi witnesses had "abandoned" Lee and his defense. As a result of the denial of Lee's oral motion for a continuance, no alibi defense was presented, and not surprisingly—indeed inevitably—Lee was convicted by the state court jury.

On direct appeal, the Missouri Court of Appeals affirmed the denial of Lee's motion for a continuance, concluding that the denial of the motion was proper, because Lee's counsel failed to comply with two Missouri Supreme Court Rules, Rules 24.09 and 24.10. Rule 24.09 requires that motions for continuances be in writing and supported by affidavits, unless the adverse party consents to an oral application. Rule 24.10

sets out the information that must be included in a motion for a continuance that is grounded on the absence of a witness. The state trial court, however, had not relied upon either of these rules in denying Lee's motion for a continuance, nor had the state resisted the motion on these grounds.

In this action for *habeas corpus* relief, Lee asserts that the denial of his motion for a continuance violated his federal right to due process. The federal district court to which Lee's petition for *habeas corpus* relief was presented concluded from the reliance by the state court of appeals upon its procedural rules that Lee's due process claim was procedurally defaulted. Specifically, the court below concluded that the decision of the Missouri Court of Appeals was based on an adequate and independent state law ground, which bars federal *habeas corpus* review. The majority agrees, and concludes further that Lee cannot overcome this impediment, because Lee is unable to demonstrate either "cause and prejudice" or "actual innocence."

A federal court's review of a *habeas* petition is barred when a state court dismisses or rejects a prisoner's claims on adequate and independent state law grounds, unless a petitioner can demonstrate either (1) cause and prejudice or (2) actual innocence. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). I concur with the majority's conclusions that Lee is unable to demonstrate "cause and prejudice" or "actual innocence." Lee cannot establish the necessary "cause," because he failed to raise before the state court his asserted "cause," which he alleges was his trial counsel's ineffective assistance in failing to follow Missouri's procedural rules for a continuance. *Wyldes v. Hundley*, 69 F.3d 247, 253 (1995), *cert. denied*, 517 U.S. 1172 (1996). I also agree that Lee cannot satisfy the demanding criteria of an "actual innocence" claim, because he has failed to offer new, reliable evidence of his innocence in light of which "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Knox v. Iowa*, 131 F.3d

1278, 1282 (8th Cir. 1997). If Lee had been allowed a short continuance and had been able to present his alibi defense, he might very well have been acquitted, but he might also have been convicted. While the evidence against Lee was not strong, I recognize that a jury would have been free either to accept or reject his alibi defense. Therefore, I cannot find that Lee meets *Schlup's* high hurdle of "actual innocence"—even though he may in fact be innocent.

I nevertheless dissent, because I do not believe that we need to reach the question of whether Lee can overcome denial of his due process claim on adequate and independent state law grounds. Rather, I find that the decision of the Missouri Court of Appeals did not rest on any such adequate and independent state law ground. Therefore, I would hold that federal *habeas* review is *not* precluded in this case.

A panel of this court recently discussed the nature of, and limitations to, the bar to federal *habeas* review provided by denial of a claim on an "adequate and independent state law ground" as follows:

> Procedural default of a claim under state law may constitute an independent and adequate state ground, *Harris v. Reed*, 489 U.S. *255*, 262 (1989), but only if the state procedural rule is firmly established, regularly followed, and readily ascertainable. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). The underlying principle is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." *Easter v. Endell*, 37 F.3d 1343, 1347 (8th Cir. 1994). Or, as Justice Holmes expressed it, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24, 445. Ct. 13, 68 L. Ed. 143 (1923).

White v. Bowersox, 206 F.3d 776, 780 (8th Cir. 2000).

The "adequacy" of a state procedure presents a question of federal law. *Sloan v. Delo, 54* F.3d 1371, 1379 (8th Cir. 1995), *cert denied sub nom. Sloan v. Bowersox*, 516 U.S. 1056 (1996). A state law rule is not "adequate" to defeat federal *habeas* review if the rule is "unclear," "thwarts the assertion of federal rights," is "confusing," or is not "firmly established and regularly followed." *Id.* at 1379-80; *see also White*, 206 F.3d at 780 (to be "adequate" to bar federal *habeas* review, a rule must be "firmly established, regularly followed, and readily ascertainable"). A state law ground is not "independent" if it is in any way "linked to or dependent on any federal law." *Easter*, 37 F.3d at 1345. I have no trouble joining the majority's implicit conclusion that the state procedural rules at issue here, Missouri Supreme Court Rules 24.09 and 24.10, are not "linked to or dependent on any federal law," and thus constitute "independent" state law grounds for denial of Lee's motion for a continuance. However, I strenuously disagree that these rules present any "adequate" state law ground to bar federal *habeas* review of Lee's due process claim.

In some recent decisions, this court has found certain state procedural rules were not "adequate" to bar federal *habeas* claims. In *White*, this court concluded that the petitioner was denied a fair opportunity to seek relief in his case, because the procedural rule that barred his second amended petition for state post-conviction relief was neither firmly established nor readily ascertainable. *White*, 206 F.3d at 780. The court found that the Missouri Supreme Court had introduced for the first time in White's post-conviction proceedings two limitations on a recently-recognized remedy for attorney abandonment of a petitioner in post-conviction proceedings. *Id.* at 781. However, this court found that neither limitation could

reasonably have been anticipated in advance of its application in the petitioner's case. *Id.* at 781. Importantly, the court held that whether or not a limitation was "implicit in, and correctly derived from, Missouri's prior precedents," or "appear[ed] in retrospect to form part of a consistent pattern of procedures, it should not be applied as a procedural default if the defendant could not be deemed to have been apprised of its existence." *Id.* (citing *Ford,* 498 U.S. at 423). Therefore, "even if . . . th[e state] rule forms a consistent pattern with prior [state] precedents, we could not apply it as a procedural default in this [*habeas*] case."

Similarly, in *Easter,* this court concluded that Rule 37 of the Arkansas Rules of Criminal Procedure did not meet the due process requirement of "adequacy" to bar a federal *habeas* claim. *See Easter,* 37 F.3d at 1345-46. The rule in question reinstated state post-conviction relief proceedings and set deadlines for the filing of state actions for such relief *Id.* at 1344. In *Easter,* although this court concluded that Rule 37 otherwise provided constitutionally adequate procedures, it nevertheless was not adequate to bar federal *habeas* claims, because it was not a "firmly established rule when it was applied to Easter." *Id.* at 1346. This court reiterated that conclusion in *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995), holding,

> As in *Easter,* the state has not demonstrated that Pearson was put on notice that he had a Rule 37 remedy before his filing deadline passed. The availability of Rule 37 was not firmly established when Pearson needed to pursue it. Accordingly, Pearson's Rule 37 default is not adequate to support a denial of federal review of the merits of Pearson's constitutional claims.

Pearson, 52 F.3d at 742.

The state procedural rules that purportedly stand as bars to Lee's federal *habeas* due process claim are Missouri Supreme

Court Rules 24.09 and 24.10. Rule 24.09 requires that motions for continuances be in writing and supported by affidavits, unless the opposing party consents to an oral application. Missouri Supreme Court Rule 24.10 states that a motion for a continuance, written or oral, based on the absence of a witness must state specific matters, including the materiality of the evidence and diligence to obtain it, reasonable grounds for belief that the attendance of the witness can be obtained within a reasonable time, the facts the witness will prove and that no other person who could have been procured for trial can prove those facts or prove them so fully, the applicant's good faith, and that the witness is not absent by the connivance, consent, or procurement of the applicant. The Missouri Court of Appeals has explained that "the reason for this rule is obvious, it permits the trial court to pass on the merits of the request." *State v. Robinson*, 864 S.W.2d 347, 349 (Mo. Ct. App. 1993). However, to determine the "adequacy" of the bar to federal *habeas* claims raised by these rules, I must determine whether the application of these rules by Missouri appellate courts to the circumstances presented when Lee moved for a continuance based on the sudden absence of his alibi witnesses in the midst of his trial was firmly established, regularly followed, or readily ascertainable. *White*, 206 F.3d at 780.

I acknowledge that Missouri appellate courts have routinely held that "[f]ailure to comply with Rules 24.09 and 24.10 alone is sufficient to sustain the trial court's ruling" denying a continuance. *See, e.g., State v. Dodd,* 10 S.W.3d 546, 555 (Mo. Ct. App. 1999) (treating a motion for a continuance that was not accompanied by an affidavit as an oral motion to which the state had not consented); *accord Robinson,* 864 S.W.2d at 349 (stating failure to comply with Rule 24.09 was sufficient to deny a request for a continuance, citing *State v. Diamond,* 647 S.W.2d 806, 808 (Mo. Ct. App. 1982)); *State v. Lopez,* 836 S.W.2d 28, 32 (Mo. Ct. App. 1992) (citing non-compliance with either rule, and stating

"[d]efendant's failure to request the continuance by written motion accompanied by an affidavit is sufficient grounds to affirm the trial court's ruling"); *State v. Fuller*, 837 S.W.2d 304, 306 (Mo. Ct. App. 1992) ("The failure to comply with rules prescribing means for requesting a continuance is sufficient grounds to deny the request.") (citing cases); *State v. Anderson*, 785 S.W.2d 299, 302 (Mo. Ct. App. 1990) ("We agree that the defendant's failure to request the continuance by a written motion accompanied by an affidavit is sufficient ground for this court to affirm the trial court's ruling," thus relying on failure to meet the requirements of Rule 24.09, but finding "[m]ore important" was non-compliance with the requirement of Rule 24.10 that the personal presence of the witness could reasonably be obtained); *State v. Fletcher*, 758 S.W.2d 476, 478 (Mo. Ct. App. 1988) ("Defendant's failure to file the request in writing accompanied by an affidavit showing good cause as required by Rule 24.09 is sufficient ground to affirm the trial court's action.") (quoting *Diamond*, 647 S.W.2d at 808); *State v. Gasaway*, 720 S.W.2d 3, 5-6 (Mo. Ct. App. 1986) ("Where a defendant fails to comply with Rule 24.10, the trial court does not abuse its discretion in denying a continuance.").

I acknowledge further that Missouri appellate courts have routinely affirmed denials of oral motions for continuances that were prompted by the absence of a witness when the motions were made at or near the time of trial, or even during trial, on the ground that the motions did not comply with Rule 24.09 or Rule 24.10. *See State v. Wolfe*, 13 S.W.3d 248, 261 (Mo. 2000) (*en banc*) (affirming denial of an oral motion for continuance made in the course of trial after the trial court's denial of a motion to introduce an affidavit by the absent witness); *Dodd*, 10 S.W.3d at *555* (not indicating precisely when the oral motion for continuance was made, although it was apparently made in proximity to or during trial, and affirming denial of the motion); *Robinson*, 864 S.W.2d at 348 (affirming denial of a motion for continuance pursuant to

Rules 24.09 and 24.10 made at "docket call" three days before trial); *Lopez*, 836 S.W.2d at 31-32 (affirming denial of an oral motion for a continuance based on the absence of a witness apparently made on the second day of trial as an alternative to a request for late endorsement of another witness); *Fuller*, 837 S.W.2d at 306 (affirming denial of an oral motion for a continuance owing to the absence of a witness made on the day of trial); *State v. McCarter*, 820 S.W.2d 587, 588 (Mo. Ct. App. 1993) (affirming denial of an oral motion for a continuance owing to the absence of a witness made on the morning of trial); *Anderson*, 785 S.W.2d at 302 (affirming denial of an oral motion made on the day of trial); *Fletcher*, 758 S.W.2d at 478 (affirming denial of an oral motion for a continuance made "[a]fter the jury was seated"); *Gasaway*, 720 S.W.2d at 5 (affirming denial of an oral motion for a continuance made on the third day of trial); *Smith*, 633 S.W.2d at 416 (affirming denial of an oral motion for a continuance made "at the close of trial, before submission to the jury").

However, in *not one* of these cases was the absence of the witness sudden or unexpected. *Wolfe*, 13 S.W.3d at 261 ("Defense counsel told the judge that she had been trying to contact the [absent witness], but no one had seen her in weeks" and "[t]he State replied [to the motion for continuance] that it also could not find the [absent witness]."); *Dodd*, 10 S.W.3d at 555 (both the state and the defendant had attempted to subpoena the absent witnesses for prior proceedings and the defendant "conceded in his motion that he had not been able to locate the [absent witnesses] for several months before his trial"); *Robinson*, 864 S.W.2d at 348 (in premature reliance on a plea agreement that fell through, the defendant had not availed himself of the opportunity to depose the state's witnesses, even though the state had made those witnesses available); *Lopez*, 836 S.W.2d at 31-32 (nothing indicated the absence of the witness was a surprise); *Fuller*, 837 S.W.2d at 306 (the absent witness "had

been missing for more than a year, despite extensive efforts to locate her by both sides"); *McCarter*, 820 S.W.2d at 588-89 (in the oral motion, defendant alleged that the absent witness had not been located, had left town, and had no exact address at which he could be located, and counsel stated further that "[w]e are not sure if we can . . . find this man," and the court concluded that the motion was "insufficient on the matter well known before trial" and "the factual basis for the motion was not a last minute or unexpected surprise"); *Anderson*, 785 S.W.2d at 302 (it appeared that the absent witness "had fled the jurisdiction and that a 2-year effort to locate her had been unsuccessful"); *Gasaway*, 720 S.W.2d at 5 (although the oral motion for continuance was made on the third day of trial, the absent witness, who had appeared pursuant to a subpoena on the first day, had been absent the second day of trial, the trial court had issued a writ of body attachment, and the sheriff had made a "diligent" but unsuccessful effort to locate the witness); *Smith*, 633 S.W.2d at 416 (trial counsel had not shown "due diligence in securing the attendance of the witness, or his testimony by deposition for a year before trial," even though the testimony the absent witness was intended to impeach was known to counsel for about a year before trial). The situation was slightly different in *Fletcher*:

> Counsel stated that she was not aware of two of the potential alibi witnesses until a very short time ago. She was unaware of the third until the morning of the trial. The defendant stated he expected an alibi witness to appear but she had been subpoenaed to a child support hearing and could not appear.

Fletcher, 758 S.W.2d at 478. Nevertheless, the absence of the alibi witnesses in that case appeared to have more to do with lack of diligence than sudden and unexpected absence of a witness who had already presented himself or herself at the time of trial. *See id.*

Indeed, the reliance in all of these decisions on the defendant's prior knowledge of the unavailability of the witness, or circumstances that should have suggested to counsel that the witness would be unavailable at trial, implies that a truly unexpected absence of a witness, as occurred in this case, might excuse failure to comply or relax compliance with the written motion requirements of Rule 24.09 and the content requirements of Rule 24.10. *See, e.g., McCarter*, 820 S.W.2d at 589 (specifically noting that failure to comply with the requirements of Rule 24.09 was sufficient grounds to deny a motion for continuance, stating that this was "particularly true where the factual basis for the motion was not a last minute or unexpected surprise").

Thus, I do not find that the application of Rules 24.09 and 24.10 was "firmly established" or "regularly followed" in the circumstances in which Lee made his motion for continuance, that is, circumstances involving the sudden and unexplained absence of alibi witnesses who had been in attendance just prior to a recess after which their testimony was required and who were under subpoena to appear at that time. *Cf. White*, 206 F.3d at 780 (the limitations on the newly-recognized claim of attorney abandonment were introduced only in the petitioner's case, and therefore were not "firmly established" at the time his claim was denied on the basis of those limitations); *Pearson*, 52 F.3d at 742 ("The availability of Rule 37 [of the Arkansas Rules of Criminal Procedure] was not firmly established when Pearson needed to pursue it."); *Easter*, 37 F.3d at 1346 (Rule 37 of the Arkansas Rules of Criminal Procedure otherwise provided constitutionally adequate procedures, but nevertheless was not adequate to bar federal *habeas* claims, because it was not a "firmly established rule when it was applied to Easter").

Moreover, the possibility that application of Rules 24.09 and 24.10 to the circumstances presented in Lee's case was somehow "implicit in, and correctly derived from, Missouri's

prior precedents," or "appear[ed] in retrospect to form part of a consistent pattern of procedures," is not sufficient to bar his federal *habeas* claims, because those rules "should not be applied as a procedural default if the defendant could not be deemed to have been apprised of" their applicability. *White*, 206 F.3d at 780 (citing *Ford*, 498 U.S. at 423). The circumstances in which Lee moved for a continuance make it particularly unlikely that he could be deemed to have been apprised of the applicability Rules 24.09 and 24.10. As a practical matter, it is simply unrealistic to suppose that, when confronted during trial with the sudden and unexplained absence of witnesses who have previously been in attendance, both voluntarily and under subpoena, counsel will be able to produce a written motion, supported by an affidavit, as required by Rule 24.09, detailing expressly the information required by Rule 24.10. Indeed, it appears that neither the trial judge, Lee's counsel, nor opposing counsel considered the applicability of these rules in the circumstances, although the Missouri Court of Appeals later relied upon them to affirm the trial court's denial of a continuance. Therefore, I would hold that applicability of these rules in Lee's circumstances was not only not "firmly established" or "regularly followed," it was not "readily ascertainable." *Id.*

There are yet more grounds on which I would hold that failure to comply with Rules 24.09 and 24.10 does not constitute an "adequate and independent state law ground" for denial of federal *habeas* review. I would also hold that application of these rules in Lee's circumstances stands as no bar, because the rules would "thwar[t] the assertion of federal rights" in the circumstances of this case. *Sloan v. Delo*, 54 F.3d 1371, 1379 (8th Cir. 1995), *cert denied sub nom. Sloan v. Bowersox*, 516 U.S. *1056* (1996). In *Henry v. Mississippi*, 379 U.S. 443 (1965), the United States Supreme Court held that a state procedural ground was "adequate" to preclude federal review of a constitutional claim only if it outweighed the strong federal interest in hearing federal claims. *Henry*,

379 U.S. at 447; *cf Sykes*, 433 U.S. at 88-90 (holding Florida's "contemporaneous objection rule" to be an adequate state ground based on the important state interests it serves). A review of case law reveals instances in which federal courts have found the state interest furthered by the rule in question was not adequate to bar federal *habeas* claims, because that state interest had already been fulfilled. *See Smart v. Scully*, 787 F.2d 816, 820 (2d Cir. 1986); *see also Gaston v. Gostello*, 74 F. Supp. 2d 262, 274 (E.D.N.Y. 1999) (holding that a state appellate court's application of the "contemporaneous objection rule" did not preclude *habeas* review); *United States ex re. Smith v. DiBella*, 314 F. Supp. 446, 447 (D. Conn. 1970) (holding that rigid adherence to a state procedural rule, which required an appellant to submit a motion to correct a trial court's findings within two weeks after the findings are filed, was "so lacking in fundamental fairness as to constitute 'a miscarriage of justice which should not be permitted to occur.'") (quoting *Christoffel v. United States*, 190 F.2d 585, 594 (D.C. Cir. 1950)).

This line of authorities is exemplified by the decision of the Second Circuit Court of Appeals in *Smart*, 787 F.2d 816. In *Smart*, a petitioner prosecuting his *habeas* action *pro se* sought federal review on the ground that his incompetence at the time he entered his guilty plea had rendered his guilty plea involuntary. *Id.* at 817. In response, the state asserted that the petitioner had procedurally defaulted, because he had not sworn to his allegations of fact, as required by state procedure. *Id.* at 818. The district court denied the petition on the ground that the failure to include sworn allegations constituted procedural default. *Id.*

The Second Circuit Court of Appeals, however, reached the merits of the petitioner's claim, finding that the state court's denial was not based on an "adequate and independent" state ground warranting federal refusal to consider the federal issues. *Id.* at 820. The appellate court reasoned

that the state interest in having petitioners swear to their allegations of fact was not sufficient to preclude federal consideration of the petitioner's *habeas* claim, because the petitioner's pleading, "while not in compliance with state procedure, notified the court as to his constitutional claim and gave the state court a clear opportunity to address his claim or allow him to replead." *Id.* The court reasoned further that "Smart's type of error does not at all implicate the concerns expressed in [*Wainwright v. Sykes*, 433 U.S. 72 (1977)]," which related to improper diminution of "the significance of the state proceeding as the appropriate forum for the adjudication of all claims in a state criminal prosecution" to obtain some "strategic advantage." *Id.* at 820-21. Instead, the court could "perceive of no tactical benefit to be derived from Smart's failure," where "[h]is noncompliance with a threshold requirement of post-conviction relief caused him to suffer dismissal of his motion without providing any opportunity for a favorable outcome." *Id.* at 821. Thus, the appellate court in *Smart* found that this was not a situation in which a defendant "could preserve an opportunity for success at the state level while embedding in the state record a basis for possible future habeas relief." *Id.* at 821.

Likewise, I can perceive of no situation under which Lee "could preserve an opportunity for success at the state level while embedding in the state record a basis for possible future habeas relief" *Id.* Here, Lee informed the court of all the information he had regarding his witnesses' surprising disappearance. Given the three witnesses' sudden, unexplained absence from the courthouse during the middle of a trial day, it is impossible to imagine that counsel could have done more to meet the requirements of Missouri Supreme Court Rules 24.09 and 24.10.

Furthermore, it is difficult to understand what part of Rule 24.10 was not satisfied, either by counsel's representations at the time he moved for a continuance or by the circumstances

otherwise known to the court; therefore, the trial court was notified of the grounds for the motion for a continuance and was given a clear opportunity to address its merits. *Cf. Smart*, 787 F.2d at 820 (the petitioner's pleadings, "while not in compliance with state procedure, notified the court as to his constitutional claim and gave the state court a clear opportunity to address his claim or allow him to replead," and thus non-compliance with the state procedure was not an "adequate and independent state ground" to bar *habeas* claims). The materiality of the testimony of alibi witnesses in Lee's case was obvious, when counsel had detailed in his opening statements that the alibi witnesses would testify that Lee was in California, not Kansas City, at the time of the murders, and the diligence of the applicant in attempting to obtain the presence of the witnesses was equally apparent, because the witnesses had previously been present and were under subpoena. *See* MO. SUP. CT. R. 24.10(a). Counsel's representation that he believed the witnesses were still in town, because they intended to attend a religious service, in my opinion, established reasonable grounds for belief that the attendance of the witnesses could be procured within a reasonable time. *See* MO. SUP. CT. R. 24.10(b). Counsel's indication in his opening statement of the critical content of the alibi witnesses' testimony adequately indicated what facts the witnesses would prove, and it should have been obvious that no other testimony could adequately establish Lee's alibi defense. *See* MO. SUP. CT. R. 24.10(c). Counsel's representations that the witnesses had been present at the courthouse before the lunch recess and that he had no idea why they had not returned was sufficient, in my view, under the circumstances, to satisfy the requirements of the rule that the witnesses not be absent by connivance, consent, or procurement of the applicant, and that Lee was seeking a continuance in good faith and not simply for purposes of delay. *See* MO. SUP. CT. R. 24.10(d).

However, after quoting the provisions of the rule, the Missouri Court of Appeals stated only, "After a careful review of the record, we find appellant's motion was made without the factual showing required by Rule 24.10," and that denial of a motion based on a deficient application was not an abuse of discretion." *State v. Lee*, No. WD 49456, slip op. at 5 (Memorandum Supplementing Order Affirming Judgment Pursuant To Rule 84.16(b) and 30.25(b)). Thus, the court that relied on Rule 24.10 failed to specify in what respect Lee's motion for a continuance owing to the sudden absence of alibi witnesses was deficient. Furthermore, as I believe any seasoned trial lawyer would agree, requiring that a motion for a continuance be in writing, with supporting affidavits, as required by Rule 24.09, when the motion is made in the midst of trial upon the discovery that subpoenaed witnesses are suddenly absent, would be so bizarre as to inject an Alice-in-Wonderland quality into the proceedings.

It must be remembered that these three witnesses had voluntarily traveled from California to Missouri for Lee's trial and had been present, and apparently ready and willing to testify on Lee's behalf, that very morning. Moreover, Lee's witnesses' affidavits raise a serious factual issue, which no court has addressed, as to whether state action was responsible for the disappearance of the witnesses from the courthouse in the middle of the day on which their testimony was required. The trial court, however, did not even attempt to enforce the subpoenas for these witnesses or otherwise attempt to ascertain why they were suddenly absent. *Cf. Gasaway*, 720 S.W.2d at 5 (the oral motion for continuance was not denied until the day after the absence of the witness under subpoena was discovered, the trial court had issued a writ of body attachment, and the sheriff had made a "diligent" but unsuccessful effort to locate the witness).

In short, this is not a case in which Lee was "sandbagging" the state trial court in a strategic maneuver to forgo adjudication of issues in state court while embedding in the

record a ground for future federal habeas corpus relief. *See Smart*, 787 F.2d at 821 (considering whether the petitioner's non-compliance with state rules is simply an attempt to embed in the state record a basis for possible future habeas relief). Rather, Lee effectively placed the state court on notice as to the wounds for his motion for a continuance such that the state court had the opportunity to address the merits of his request. *Id.* at 820 (mere non-compliance with state rules should not preclude federal review, where the petitioner's defective motion nevertheless gave the state court a clear opportunity to address his contentions). I conclude that, under these unique circumstances, Lee's failure to comply fully with Missouri Supreme Court Rules 24.09 and 24.10 is insufficient to preclude federal consideration of Lee's habeas claim. *See id.* at 820-21. Rather, strict compliance with these rules would "thwar[t] the assertion of federal rights" in the circumstances of this case. *Sloan*, 54 F.3d at 1379.

To put it another way, applying these rules in the circumstances of Lee's case is not "fundamentally fair." *Engle*, 456 U.S. at 1 26; *accord Strickland* v. *Washington*, 466 U.S. 668, 697 (1984) (observing that "fundamental fairness is the central concern of the writ of habeas corpus"); *Sykes*, 433 U.S. at 96-97 (Stevens, J., concurring) (measuring the appropriateness of *habeas corpus* relief against a "fundamental fairness" standard). It is instead rampant elevation of procedure over substance. *Cf. Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting) (decrying the elevation of procedural impediments to vindication of federal rights in *habeas corpus* actions). We must not lose sight of the underlying principle behind the bar raised by an "adequate and independent state law ground," which is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." *White*, 206 F.3d at 780 (quoting *Easter*, 37 F.3d at 1347). The procedural rules raised as a bar here provided Lee with no

such fair opportunity, in the circumstances of his case, to obtain a continuance and mount his alibi defense.

This case, in no small measure, reflects the current status of federal *habeas corpus* jurisprudence. Judicial interpretation of the Great Writ during the past three decades has spun a cascading web of confounding and labyrinthine procedural obstacles, *see Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting); *Murray v. Carrier*, 477 U.S. 478, 497 (1986) (Stevens, J., concurring in the judgment) ("The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in a procedural maze of enormous complexity."), notwithstanding that the Supreme Court once recognized that "habeas corpus is not 'a static, narrow, formalistic remedy . . ., but one which must retain the 'ability to cut through barriers of form and procedural mazes.' " *Hensley v. Municipal Court, San Jose Milpitas Jud. Dist., Santa Clara County, Cal*, 411 U.S. 345, 349-350 (1973) (quoting Jones *v. Cunningham*, 371 U.S. 236, 243 (1963), and *Harris v. Nelson*, 394 U.S. 286, 291(1969)). This large and increasingly complex web has now virtually obscured the core purpose of the Writ.

Not only has this procedural web taken on a life of its own, it has developed its own unique nomenclature, a procedural cant further obscuring the merits of most *habeas corpus* actions: Rather than addressing the underlying merits of the constitutional claims asserted by a petitioner for *habeas corpus* relief, opinions in *habeas* actions are now riddled (in both the primary and secondary sense of the word) with terms like "procedural default," "cause and prejudice," "abuse of the writ," "successive petitions," "mixed petitions," "adequate and independent state law grounds," "the 'look through' presumption," "the total exhaustion rule," "state waiver of the exhaustion defense," "non-retroactivity," "non-cognizable constitutional claims," "fairly presented claims,"

"unintended claims," "objective factors external to the defense," and "the presumption of correctness." The vast majority of federal *habeas* petitioners find themselves entangled in this omnipresent and perplexing procedural web, which effectively precludes federal courts from ever reaching the merits of their constitutional claims. For example, when the Third Circuit Court of Appeals recognized that a case before it "illustrate[d] the complexity engendered by the current federal habeas corpus doctrine of procedural default," *Hull v. Feeman*, 991 F.2d 86, 88 (3d Cir. 1993), the court also expressed its concern that its method for breaking free of the procedural web, so that it could reach the merits of the petitioner's claim, might instead "have placed [the petitioner] into an enclosed loop from which he cannot escape." *Id.* at 94 n.6.

With the inevitable focus on this bewildering array of convoluted procedural obstacles, it is all too easy to look past some crucial, simple truths. First, the mystifying procedural web most often traps and snares all but the most sophisticated or just plain lucky petitioners, and Lee is neither. Second, there is a reasonable possibility that Lee is in fact innocent. The case against him, based primarily on shaky eye-witness testimony with no corroborating physical evidence, was not strong. Third, his state court conviction was virtually assured by the trial judge's denial of his oral motion for a short continuance, because he was thereby precluded from presenting his alibi defense. The prejudicial effect of the denial of his motion for a continuance is especially apparent in light of defense counsel's promise, in his opening statement, to present an alibi defense and witnesses. Fourth, the trial court's summary denial of a continuance—on grounds that appear to me to be unreasonable and completely arbitrary, and hence fundamentally unfair, in the circumstances presented and in the face of a justifiable request for a brief delay—most probably amounts to an unconstitutional denial of due process. *See, e.g., McMiller v. Lockhart*, 915

F.2d 368, 372 (8th Cir. 1990) (a *habeas* petitioner's due process claim founded on denial of a motion for continuance of his criminal trial was judged against "fundamental fairness" and "abuse of discretion" standards, in light of the circumstances of the case), *cert. denied*, 498 U.S. 1108 (1991); *White v. Lockhart*, 857 F.2d 1218, 1220 (8th Cir. 1988) (where the *habeas* petitioner asserted a due process violation in the trial court's refusal to continue his criminal trial, the court noted that "'[o]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of justifiable request for delay'" rises to the level of a constitutional violation," quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), and stating that, to prevail, the petitioner "must show that in denying his request for a continuance the district court acted in a manner 'so egregious that it was fundamentally unfair,'" quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)); *Loggins v. Frey*, 786 F.2d 364, 366-67 (8th Cir.) (where a *habeas* petitioner asserts a violation of due process based on denial of a continuance, "'[o]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay'". . . . may give rise to a violation of due process") (quoting *Morris*, 461 U.S. at 11-12, in turn quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)), *cert. denied*, 479 U.S. 842 (1986). Lastly, it is hard to conceive of a more arbitrary action of a trial judge that could inflict greater prejudice to a defendant in a criminal case than the actions of the trial judge in Lee's case.

In sum, I would reverse the decision of the district court. I would hold that there is no procedural default, because there is no "adequate and independent state law ground" barring federal *habeas* review. Consequently, I would remand this *habeas* action for an evidentiary hearing on Lee's claim that he was denied due process when the state trial court refused to grant him a continuance in order to permit him to secure the testimony of his three subpoenaed alibi witnesses. The

district court should have the first opportunity to decide the merits of Lee's federal constitutional claim.

A true copy.

Attest: Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Filed Sept. 5, 2000]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2406WMKC

REMON LEE,

Appellant,

v.

MIKE KEMNA, Superintendent;
JEREMIAH (JAY) NIXON, Attorney
General,State of Missouri,

Appellees.

Appeal from the United States District Court
for the Western District of Missouri
98-74-CV-W-8-P

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 25, 2000

A true copy.

Attest: Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-24O6WMKC

REMON LEE,

Appellant,

v.

MIKE KEMNA, *et al*.,

Appellees.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied. (5128-010199)

August 8, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit